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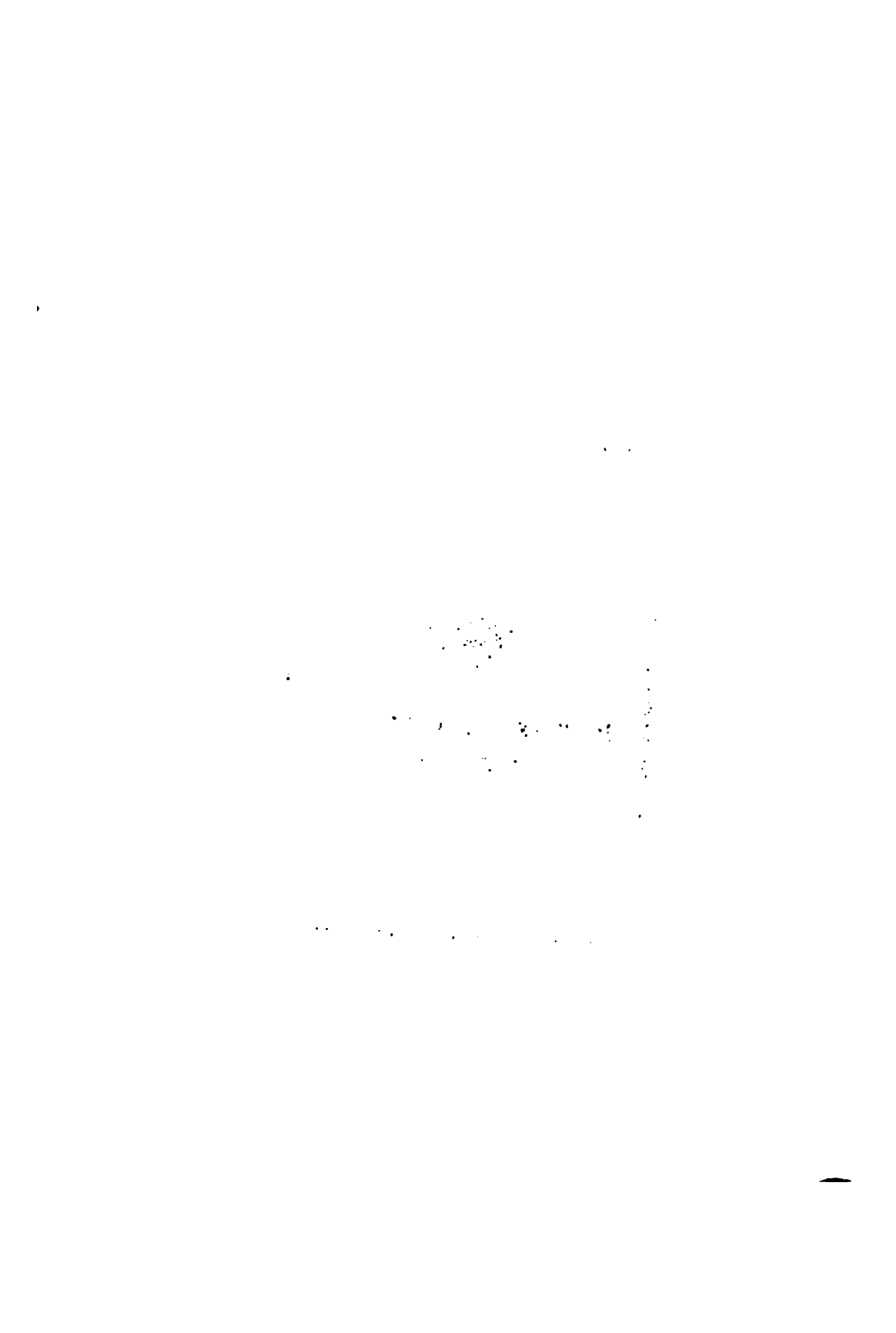
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ERRATA.

Page 24, line 7, word "An" instead of "No."

Page 176, line 4 of the syllabus, the word "notice" instead of "notive."

Page 282, line 1, chapter "1439" should be "143."

Page 391, line 21, figures "287,500" instead of "285,500."

Page 405, line 4, word "logical" instead of "radical."

Page 515, line 5, from the bottom, the word "defendant" should be "plaintiff."

Page 548, line 20, figures "1658" should be "1648."

Page 582, line 12, the word and figures "Act 146" should read "Act 147."

Page 598, line 13, R. L. Sec. "1791" should be "1971."

Page 603, line 1 of syllabi word "unauthorized" instead of "authorized."

Pages 644-652, sub-title should read "21 Haw." instead of "20 Haw."

Page 657, line 25, word "construction" instead of "consideration."

Page 777, first and second paragraphs to be read as one paragraph.

**JUSTICES OF THE SUPREME COURT
OF THE
TERRITORY OF HAWAII**

DURING THE PERIOD COVERED BY THIS VOLUME.

CHIEF JUSTICE:

ALEXANDER GEORGE MORISON ROBERTSON.

ASSOCIATE JUSTICES:

ANTONIO PERRY.

JOHN THOMAS DE BOLT.

ATTORNEYS GENERAL

ALEXANDER LINDSAY, JR.,

Resigned.

WADE WARREN THAYER,

Appointed January 1, 1913.

CIRCUIT JUDGES

DURING THE PERIOD COVERED BY THIS VOLUME.

FIRST CIRCUIT.

FIRST JUDGE:

HENRY E. COOPER.

SECOND JUDGE:

WILLIAM L. WHITNEY.

THIRD JUDGE:

WILLIAM J. ROBINSON.

SECOND CIRCUIT.

SELDEN B. KINGSBURY.

THIRD CIRCUIT.

JOHN ALBERT MATTHEWMAN.

FOURTH CIRCUIT.

CHARLES F. PARSONS.

FIFTH CIRCUIT.

JACOB HARDY.

Resigned.

LYLE ALEXANDER DICKY,

Qualified July 17, 1912.

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CASES DECIDED
BY THE
SUPREME COURT
OF THE
TERRITORY OF HAWAII

LAWRENCE H. DEE *v.* ELIZABETH FOSTER.

RESERVED QUESTION FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED JANUARY 4, 1912.

DECIDED JANUARY 9, 1912.

ROBERTSON, C.J., DE BOLT, J., AND CIRCUIT JUDGE COOPER
IN PLACE OF PERRY, J.

FRAUDULENT CONVEYANCES—*statute 13th Elizabeth—common law.*

The statute of 13th Elizabeth relating to conveyances made in fraud of creditors was in affirmance of the principles of the common law and is a part of the common law of this Territory.

SAME—*conveyances void at law as well as in equity.*

A deed void because made with intent to defraud a creditor is, as to the defrauded creditor, void at law as well as in equity.

SAME—*right of purchaser at execution sale.*

The purchaser at an execution sale of a debtor's interest in land acquires the legal title and may, in an action of ejectment against one in possession claiming under a deed from the debtor, attack the validity of the deed on the ground that it was made with intent to defeat the judgment and defraud the judgment creditor.

Dee v. Foster, 21 Haw. 1.

OPINION OF THE COURT BY ROBERTSON, C.J.

This is an action of ejectment for the recovery of certain land at Makolelau, Molokai. The case was being tried in the court below, jury-waived, when the court reserved for the consideration of this court the question hereinafter stated.

It is made to appear that on April 24, 1900, the plaintiff in this case and others, stockholders in the Kamalo Sugar Company, Limited, acting for the corporation upon the refusal of the directors of the company to take action, commenced a suit in equity against Frank H. Foster, the husband of the defendant in this case, and two others, asking for an accounting and other relief, which suit resulted in the entry on June 9, 1902, of a final decree against the defendants requiring them, among other things, to pay into court for the benefit of the said corporation the sum of \$34,820. Execution against the property of the defendants was issued upon that decree on July 7, 1902, and pursuant thereto the sheriff sold the land in question as the property of Frank H. Foster. The plaintiff herein purchased the land at the execution sale and now claims under the deed executed and delivered to him by the sheriff in the name of Frank H. Foster. The defendant put in evidence two deeds purporting to convey the land in dispute, one from Frank H. Foster, in which the defendant joined, to one Harry Armitage, dated July 7, 1900, and the other from Armitage to the defendant, dated the same day. The deeds were duly recorded and each expressed a consideration of one dollar. The plaintiff, attacking the validity of those deeds, offered to show the value of the land in dispute, and that at the time Foster made the deed to Armitage he had not other property sufficient to satisfy the decree which was subsequently rendered against him in the then pending suit.

The trial court thereupon reserved to this court the question, "Can the deeds from Frank H. Foster to Harry Armitage and from Harry Armitage to the defendant above referred to

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be attacked in this action by the plaintiff on the ground that the same were executed and delivered in fraud of creditors?"

In most, if not all, of the states express statutes govern conveyances made in fraud of creditors, but we have no such statute in this Territory. In England, the statute of 13th Elizabeth declared to be "clearly and utterly void" as against the person defrauded, or his representatives, all conveyances made with the intent to "delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages," etc.

It has been authoritatively held that that statute was declaratory of the common law and in affirmance of its principles. *Cadogan v. Kennett*, 2 Cowp. 432, 98 Eng. Rep. (reprint) 1171; *Sumner v. Hicks*, 2 Black 532; *Sands v. Codwise*, 4 Johns. 536, 596; *Gardner v. Cole*, 21 Ia. 205, 210.

The rule that a conveyance made with the intent to defeat a judgment is void as against the judgment creditor was regarded as law in this jurisdiction by Chief Justice Lee as long ago as 1847. *Wood v. Stark*, 1 Haw. 8. And in *Cockett v. Hubbard*, 1 Haw. 101, the learned chief justice said: "Fraud is so offensive to every principle of law, that where a conveyance is tainted with it, the deed cannot be permitted to stand. Where a man purchases property with a view of defeating the claims of creditors, the sale is void; for the purpose is iniquitous. The law will not allow one man to assist another in cheating a third."

Had the principle not been previously recognized we would not hesitate to hold that it was incorporated into our law by the provision of the Judiciary Act of 1892 which has become section 1 of the Revised Laws.

In some of the states the statute of Elizabeth has been held to be a part of the common law of the State. *Robinson v. Holt*, 39 N. H. 557; *Tobie Mfg. Co. v. Waldron*, 75 Me. 472. It is a part of the common law of this Territory.

We cannot give our assent to the contention of counsel for

Dee v. Foster, 21 Haw. 1.

the defendant that, because in this Territory the jurisdictional distinction between law and equity is maintained, relief against conveyances made in fraud of creditors can be had only on the equity side of the court. Such fraudulent transfers are void at law as well as in equity. *Clements v. Moore*, 6 Wall. 299, 312; *Moore v. Williamson*, 44 N. J. E. 496. "The statute of Elizabeth applies, so far as its language, our only guide, indicates, to all cases and to all courts; the debtor remains the owner." 2 Bigelow on Fraud 395.

Although, as between the parties to such a conveyance, the title will pass, yet as against a defrauded creditor the transfer is void; the debtor remains the owner; a sheriff's deed of the debtor's interest will pass the legal title to the purchaser; and the purchaser may assert and rely on that title in any appropriate action at law. This is recognized by the weight of authority and has the support of reason. 20 Cyc. 656, 660; Freeman on Executions Sec. 136; 14 A. & E. Enc. Law (2d ed.) 311.

"I understand it to be well settled that an existing creditor who wishes to subject property to the payment of his debt, which has been conveyed by his debtor by a voluntary deed to another, before judgment obtained, has two remedies, to either of which he may resort, to wit: he may disregard the conveyance as fraudulent and void, and proceed to sell the property under his execution, leaving the validity of the deed to be determined in an action of the purchaser at such sale to recover possession of the land; or he may, by an action on the equity side of the court, have the deed set aside on the ground of fraud, and the land conveyed by it subjected to the payment of his debt." *Amaker v. New* (S. C.), 8 L. R. A. 687, 688.

"The authorities sustain the proposition that the question may be determined in an action of ejectment, but it is clear, upon principle, that it must be tried as all other issues and questions are tried, and determined and judged by the rules of law, statutory or otherwise, applicable generally to litigated questions. In this action plaintiff made the fraudulent character of the transfer, by his complaint, an affirmative issue in the action; and the burden was upon him to establish all

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the material allegations there set forth, to warrant a recovery in his favor. The situation with respect to the trial of this particular question would be the same, however, if the allegations of the pleadings were general, alleging title in the parties in general terms." *Brasie v. Minneapolis Brewing Co.*, 87 Minn. 456, 462. See also *Thompson v. Baker*, 141 U. S. 648; *Mulford v. Peterson*, 35 N. J. L. 127; *Drum v. Painter*, 27 Pa. St. 148; *Helms v. Green*, 105 N. C. 251; *Smith v. Reid*, 134 N. Y. 568; *Gunn v. Hardy*, 31 So. (Ala.) 443; *Wood v. Fisk*, 45 Ore. 276; *Ward v. Sturdivant*, 98 S. W. (Ark.) 690; *Carroll v. Salisbury*, 28 R. I. 16.

Cases holding the contrary, cited by the defendant, appear to be based on special statutory provisions or rest upon the view, which we decline to adopt, that the purchaser at an execution sale, when the debtor has made a transfer to another, acquires merely an equitable title. And, we think, there is nothing in the language used in *Manuel v. Pelami*, 6 Haw. 97, or *Adams v. Bishop*, id. 116, when properly understood, which militates against the conclusion reached in the case at bar.

The purchaser of land at an execution sale of a fraudulent grantor's interest therein has the same right to treat as void a fraudulent conveyance thereof as the creditor himself had. *Orendorf v. Budlong*, 12 Fed. 24, 28; *Eastman v. Schettler*, 13 Wis. 362; *McClellan v. Solomon*, 2 So. (Fla.) 825, 828; *Mulford v. Peterson*, supra, p. 135. And the general rule is that a conveyance made upon a mere nominal consideration will be considered voluntary as against attacking creditors. 20 Cyc. 491; *Houston v. Blackman*, 66 Ala. 559; *Shaw v. Manchester*, 84 Ia. 246.

Applying these rules to the circumstances of this case we hold that the plaintiff should be allowed to contest the validity of the deeds mentioned upon the ground stated. The reserved question is, therefore, answered affirmatively.

W. W. Thayer for plaintiff.

R. B. Anderson and L. P. Scott (*Kinney, Prosser, Anderson & Marx* on the brief) for defendant.

SUPREME COURT OF HAWAII.

In re Inter-Island Steam Nav. Co., 21 Haw. 6.

IN THE MATTER OF THE APPEAL OF THE INTER-
ISLAND STEAM NAVIGATION COMPANY, LIM-
ITED, FROM A RULING OF THE AUDITOR OF
THE TERRITORY OF HAWAII.

ARGUED JANUARY 11, 1912.

DECIDED JANUARY 16, 1912.

ROBERTSON, C.J., DE BOLT, J., AND CIRCUIT JUDGE ROBIN-
SON IN PLACE OF PERRY, J.

STATUTES—consideration of—letter—intent.

In the absence of an obviously mistaken or inaccurate use of words the letter of a statute will not be extended by construction to meet the alleged intent of the legislature where no injustice, absurdity, repugnance or inconvenience will result from a literal interpretation.

SAME—Act 143, Laws of 1911, construed.

The statute making an appropriation for the purpose of repaying moneys wrongfully collected as merchandise license fees under sections 764 to 768 of the Penal Laws, 1897, did not include license fees paid prior to June 14, 1900, in advance for a period extending beyond that date.

OPINION OF THE JUSTICES BY ROBERTSON, C.J.

The appellant, Inter-Island Steam Navigation Company, Limited, presented a claim to the treasurer of the Territory for a refund of a portion of a merchandise license fee paid by it on June 7, 1900. The claim was made under and pursuant to Act 143 of the Laws of 1911, which appropriated money for the purpose of paying back "moneys wrongfully collected" as merchandise license fees under sections 764 to 768 of the Penal Laws 1897, and appellant asked for the repayment of a portion of the whole fee corresponding to the unexpired fraction of the year for which the fee was paid from a line drawn at the 14th of June, 1900. The license was dated June 2, 1900, the annual fee was \$1380.20, and the amount asked to be refunded was \$1331.05. This appeal was taken from the ruling of the auditor whereby he declined to allow the claim and refused to issue a warrant thereon.

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The statute was upheld and construed in *Smithies v. Conkling*, 20 Haw. 600, and was further considered in a subsequent proceeding between the same parties reported in 20 Haw. 675. Counsel for the auditor refers to the ruling made in the case first above referred to, where, in reply to the contention that section one of the act seemed to provide for the return of all license fees collected under the license law whether paid before or after June 14, 1900, we said that the legislature was without power to cause the repayment of fees collected prior to the date mentioned. But, as pointed out in the second *Smithies* case, the language used in the opinion in the first case must be understood to have had reference to the facts then before the court. The status of claims of licensees who had paid annual fees for periods overlapping the 14th of June was not then under consideration. In the second *Smithies* case we held that fees paid after June 14 for periods commencing before that date were wrongfully collected within the meaning of Act 143 only as to the unearned portions thereof. Counsel for the appellant base their contention that the decision in the case last decided is conclusive in favor of their client on the ground "that the moral obligation to repay appellant the amount for which no *quid pro quo* was given is as strong as in the precise instances which the court had under consideration in the case above cited." And they contend that a liberal construction should be given the words "wrongfully collected," used in the title of the act, so as to include what they conceive to be the moneys wrongfully retained.

The words "wrongfully collected" were held in the first *Smithies* case to mean illegally collected in view of the decision in *Lansing v. Theo. H. Davies & Co.*, 13 Haw. 286.

Referring to the contention of counsel for the appellant, we may concede that the legislature could have found as strong a moral obligation in favor of persons who paid merchandise license fees under the circumstances under which the appellant in this case made payment as in the case of those who paid

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fees under the circumstances shown in the second *Smithies* case, but the question presented now is whether the obligation was recognized and provided for by Act 143.

At the time the fee became due from the appellant (June 2) and at the time it was paid (June 7) the merchandise license law was in full force and effect. It was the duty of the then minister of the interior to demand payment of the fee, and it was the duty of the corporation, under penalty of a fine for refusal, to pay it. Whether a portion of the fee should thereafter be returned to the corporation was a matter for the legislature to determine, but, under the circumstances stated, it can not be argued successfully that the fee was wrongfully or illegally collected. The appellant's claim does not fall within the strict letter of the statute, nor can we see our way clear to construe the language of the act so as to make it cover claims such as that now under consideration.

It is an established canon of statutory construction that the reason and intention of the legislature will control the strict letter of the law, when the letter would lead to palpable injustice, contradiction and absurdity. *Shillaber v. Waldo*, 1 Haw. 31, 38. But in the absence of an obviously mistaken or inaccurate use of words, the legislative intent is to be found in the language of the statute and there should be no departure from that language where no injustice, inconvenience, repugnancy, or absurdity will follow from a literal interpretation. *Union Central L. I. Co. v. Champlin*, 116 Fed. 858; *Caster v. McClellan*, 132 Ia. 502; *Choctaw, etc., R. Co. v. Alexander*, 7 Okla. 591. As no injustice, absurdity or other untoward result will follow an adherence to the letter of the act in this respect, we are obliged to hold to the letter. Granting that the legislature could have found and recognized a moral obligation owing to the appellant and others similarly situated, it does not follow that we should construe the act so as to cover a class of claims not included in its terms. In *United States v. Freeman*, 3 How. 556, 565, a case often cited in support of

In re Inter-Island Steam Nav. Co., 21 Haw. 6.

the rule that in certain cases the meaning of the legislature may be extended beyond the precise words used in the law, the supreme court pointed out that there is a limitation to the rule as follows, "the limitation of the rule being, that to extend the meaning to any case not included in the words, the case must be shown to come within the same reason upon which the law-maker proceeded, and not only within a like reason." The appellant's claim does not fall within the category of moneys "wrongfully collected"—it is not within the same reason upon which the statute proceeded—though it might have afforded a like reason for relief at the hands of the legislature.

A further reason for not extending the language of the statute by construction exists in the fact that the act bears internal evidence that it was not the intention of the legislature to include claims of the class of that of the appellant. It appeared in the first *Smithies* case that the amount of twenty thousand dollars which the act appropriated for the payment of claims was insufficient to pay in full those arising from the payment of license fees after June 14, 1900. Had the legislature intended to make, in addition, a proportional refund of all fees paid after June 14, 1899, the class to which the appellant's claim would belong, it would have been necessary to appropriate about three times that amount. Notwithstanding that Act 143 was loosely drawn we must assume that the legislature acted upon definite and reliable information as to the amount of fees paid to the government for merchandise licenses, and of the probable amount of claims that would be filed under the act.

The auditor's ruling is sustained.

C. R. Hemenway (*Smith, Warren & Hemenway* on the brief) for appellant.

J. Lightfoot for the auditor.

E. W. Sutton, *Deputy Attorney General*, amicus curiae.

Territory v. Ah Cheong, 21 Haw. 10.

THE TERRITORY OF HAWAII v. AH CHEONG.

APPEAL FROM DISTRICT MAGISTRATE OF HONOLULU.

SUBMITTED JANUARY 26, 1912.

DECIDED JANUARY 30, 1912.

ROBERTSON, C.J., DE BOLT, J., AND CIRCUIT JUDGE WHITNEY IN PLACE OF PERRY, J.

PLEADING—*charge—keeping liquor for sale.*

A charge that the defendant, at a time and place named, he not being a licensee, or the agent or employee of a licensee, did unlawfully keep for sale intoxicating liquor, is sufficient.

MOTIONS—*bill of particulars.*

A motion "that the prosecution be required to furnish defendant with a bill of particulars," without pointing out the particulars desired, is not sufficient.

OPINION OF THE COURT BY DE BOLT, J.

This is an appeal on points of law from a judgment of the district magistrate of Honolulu, finding the defendant guilty of the offense of keeping for sale intoxicating liquor contrary to the provisions of section 54 of Act 119, Laws of 1907, which section reads: "Any person, other than a licensee, his agent or employee, who shall sell, dispose of, furnish or keep for sale intoxicating liquor of any kind, or shall cause to be sold, disposed of, furnished or kept for sale any such liquors by any person engaged or hired for such purpose; or any licensee, by himself or by agent or employee, who shall sell, dispose of, furnish or keep for sale, or cause to be sold, disposed of, furnished or kept for sale, any such liquors, after revocation of his license, save as permitted by this Act, shall be guilty of a misdemeanor and on conviction thereof, be fined not less than One Hundred Dollars (\$100.00) nor more than One Thousand Dollars (\$1,000.00) or be imprisoned for not more than twelve months, or both."

The charge entered against the defendant, and upon which he was tried, convicted and sentenced to pay a fine of \$100,

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was as follows: "That one Ah Cheong at Honolulu, City and County of Honolulu, Territory of Hawaii, during three months last past prior to and including the 15th day of October, A. D. 1911, then and there not being thereto authorized by license as by law provided and required, and not being the agent or servant of a person ~~thereto~~ licensed by law, unlawfully did keep for sale at those certain premises occupied by said Ah Cheong in Manoa Valley certain intoxicating liquor known as Wine and did then and there and thereby commit the offense of keeping intoxicating liquor for sale without a license contrary to Section 54 of Act 119 of the Session Laws of 1907 of the Territory of Hawaii."

The defendant demurred to the charge on the grounds that it was "vague, uncertain and unintelligible," and that it did not "set forth any facts which constitute any offense against the laws of the Territory of Hawaii." The magistrate overruled the demurrer, whereupon the defendant moved "that the prosecution be required to furnish defendant with a bill of particulars." The magistrate denied the motion.

The defendant declining to plead to the charge, the court entered a plea of "not guilty" for him; and thereupon the trial proceeded upon its merits and the defendant was adjudged guilty as charged.

The rulings of the magistrate which constitute the points of law upon which the case comes before use are, (1) overruling the defendant's demurrer; (2) denying the defendant's motion for a bill of particulars; (3) entering a plea of "not guilty" for the defendant, he declining to plead and standing mute; (4) adjudging the defendant guilty as charged.

The defendant urges as error only the two first points of law, and has, apparently, and as we will assume, abandoned the third and fourth points of law.

The defendant having failed in his first ground of demurrer to specify in what particulars the charge was "vague, uncertain

Territory v. Ah Cheong, 21 Haw. 10.

and unintelligible," the prosecution contends that this ground of demurrer cannot properly be considered by the court. In the view we take of the matter it will not be necessary to determine the question as to the sufficiency of this ground of demurrer, for the simple reason that the charge, in our opinion, as to the facts and matters therein alleged, is not "vague, uncertain or unintelligible." The facts alleged are set forth in clear and precise terms, free from ambiguity. Whether the facts alleged are sufficient to constitute the offense charged presents a question to be determined under the second ground of demurrer.

Under the second ground of demurrer the defendant contends that the charge, although set forth in the words of the statute, is not sufficient, the statute failing, as he contends, to define the offense. It is urged that the charge is too general, that it is fatally defective, in that it does not set forth all the essential elements of the offense charged, and that it does not sufficiently inform the defendant of the nature and cause of the accusation against him. Whatever force this contention might have under a charge based upon a statute failing to define the offense prescribed, we need not say. The statute before us, however, fully defines the offense in clear and unmistakable terms, and the charge is in the terms of the statute; nothing more is required. *State v. Paige*, 78 Vt. 286, 289; 22 Cyc. 336, et seq. The statute in explicit terms says that "Any person other than a licensee, his agent or employee, who shall * * * keep for sale intoxicating liquor of any kind, * * * shall be guilty of a misdemeanor." The facts thus contemplated by the statute define the offense; and it follows, necessarily, that a statement of those facts, as in the case at bar, constitutes the offense charged.

In *Com. v. Riley*, 77 Ky. 44, 47, the court said the mere charge that the defendant was "guilty of keeping a tippling-house, was a sufficient definition of the offense charged and a sufficient statement of the acts constituting such offense."

Territory v. Ah Cheong, 21 Haw. 10.

In our opinion the charge against the defendant is sufficient.

Assuming for the purposes of this case only, that the district magistrate has power to order a bill of particulars in a criminal case, was the defendant's application for a bill of particulars sufficient? We think not. The application for a bill of particulars in a criminal case should set forth with particularity what the defendant claims should be amplified. It should point out fully all the particulars desired. The defendant has obviously failed to comply with these reasonable requirements. 3 Ency. Pl. & Pr. 520, 531, 536; *State v. McDaniel*, 54 Atl. 1056; *Mathis v. State*, 34 So. 287, 290; *Eatman v. State*, 37 So. 576, 578; *State v. Reno*, 41 Kan. 674, 678, 679.

The judgment of the district magistrate is affirmed.

J. W. Cathcart, City and County Attorney, for the Territory.

F. Andrade for defendant.

IN THE MATTER OF THE APPLICATION OF ROBERT HORNER FOR A WRIT OF MANDAMUS AGAINST KUKAIAU PLANTATION COMPANY, LIMITED, A HAWAIIAN CORPORATION, AND ALBERT HORNER, PRESIDENT OF SAID CORPORATION.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED JANUARY 30, 1912.

DECIDED FEBRUARY 2, 1912.

ROBERTSON, C.J., DE BOLT, J., AND CIRCUIT JUDGE WHITNEY IN PLACE OF PERRY, J.

CORPORATIONS—*by-laws, amendment or waiver of.*

A by-law of a corporation may be waived or set aside for the time being or permanently amended, without formal action, by a course of corporate conduct inconsistent therewith in which all the stockholders have acquiesced notwithstanding another by-law provides that all motions to amend the by-laws shall require a three-fourths vote of the shares of the company.

Horner v. Kukaiau Plantation Co., 21 Haw. 13.

SAME—change of date for annual meeting by acquiescence.

A by-law provided that the annual meeting of the corporation should be held in the month of October, but following an informal agreement or understanding had between some of the stockholders present at a meeting held on June 5, 1902, the annual meeting thereafter was held in the last week of February of each year without protest or objection on the part of any stockholder. Another by-law provided that the officers should hold office for one year from their appointment and thereafter until the appointment of their successors. Held, that a stockholder whose stock was represented and voted at the annual meeting held in the last week of February, 1911, could not demand that an annual meeting for the election of officers be held before the last week of February, 1912, though he was not present at the meeting held on June 5, 1902, and now owns the majority of the stock of the corporation.

OPINION OF THE COURT BY ROBERTSON, C.J.

This is an appeal from an order made on December 29, 1911, by a judge of the circuit court of the first circuit allowing a peremptory writ of mandamus commanding the Kukaiau Plantation Company to forthwith hold its annual meeting for the year 1911, and Albert Horner, as president of the corporation, to forthwith call such meeting.

The alternative writ showed, among other things, that the petitioner, Robert Horner, owns a majority of the shares of the capital stock of said corporation; that the by-laws provide that the company shall hold an annual meeting at Honolulu in the month of October of every year, and that the power of calling all meetings is vested in the president of the company; that notwithstanding the month of October had expired no annual meeting for the year 1911 was held; that since the expiration of the month of October and prior to the date of the filing of the petition, December 16, 1911, the petitioner frequently demanded of the said corporation and Albert Horner, its president, that the annual meeting for 1911 be called forthwith, but that said corporation and said Albert Horner refused to call or hold such meeting; that the petitioner desires to have

Horner v. Kukaiau Plantation Co., 21 Haw. 13.

new officers elected for said corporation, of having a financial statement made showing the condition and standing of the company, and of having other business transacted at such annual meeting; and that the petitioner is greatly damaged and injured by reason of said refusal to call and hold such meeting. The joint and several return of the Kukaiau Plantation Company, Limited (erroneously sued as Kukaiau Plantation Company), and Albert Horner, president of said corporation, showed that the said Albert Horner has held the office of president of the company since May 18, 1907, on which date he was elected president at a special meeting of the stockholders; that he was last re-elected as such officer at an annual meeting of the corporation held on the 25th day of February, 1911; that the by-laws, a copy of which was attached to the return, provide that the officers shall hold office for one year from their appointment and thereafter until the appointment of their successors; that at a special meeting of the stockholders held on June 5, 1902, pursuant to call, in the office of H. Hackfeld & Company, Limited, at Honolulu, for the purpose of accepting the resignations of certain of the officers, at which meeting all of the shares of stock of said Kukaiau Plantation Company, Limited, including the shares of the petitioner, "were present," after officers were elected, "the attention of the stockholders was called to the fact that at each annual meeting theretofore held it became necessary to adjourn the same from the time mentioned in the by-laws, to wit, sometime in the month of October, until sometime after the first of each year, in order to receive the reports which were only made out at the end of the fiscal year, December 31st, and it was then agreed that annual meetings should thereafter be held in the last week of the month of February, said month of February being the month during which annual meetings of sugar companies in the Territory of Hawaii were at that time generally held; and it being thought best to hold said meeting in the latter part of February in order to give the accountants time to pre-

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pare a financial report;" that on the 25th day of February, 1903, an annual meeting, due notice of which was given to all of the stockholders, was held, at which meeting all of the shares of the stock of the company were "present and voting" and the officers elected on June 5, 1902, were re-elected; that on the 27th day of February, 1904, the same officers were re-elected for another term; that on the 27th day of February, 1905, an annual meeting was held, and the annual statements not having come to hand, it was adjourned to March 20, 1905, when it was further adjourned to March 27, 1905, at which time, all of the shares of the stock of the company being represented, the incumbent officers were re-elected; that in the last week of February of each year thereafter an annual meeting of the stockholders was held at which officers were elected, at all but one of which, the return alleged, the shares of stock of the petitioner were represented; that at the annual meetings so held in 1909, 1910 and 1911, Robert Horner was elected vice-president of the company; that pursuant to the agreement and understanding of all the stockholders entered into on the 5th day of June, 1902, the annual meeting of the company has since been held in the last week of the month of February of each year and that in the change so made each and all of the stockholders have acquiesced; that, upon information and belief, by the course of conduct pursued by the stockholders of said company the by-law requiring an annual meeting to be held in the month of October has been abrogated and repealed, and that by the course of conduct of said stockholders acquiesced in by each and all and participated in by all, the annual meeting of said corporation must be held in the last week in the month of February, until the same is changed by vote of the stockholders as provided in the by-laws; and that pursuant to the custom and practice of the company the president has called the annual meeting of the stockholders for the 26th day of February, 1912.

The petitioner moved to quash the return on the grounds

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that it "does not set up sufficient excuse for non-performance;" that it "sets forth no sufficient cause or defense;" and that it "is insufficient in law." The court below granted the motion and ordered the issuance of a peremptory mandate as above stated. The respondents appealed.

Counsel for the petitioner points out that the by-laws require the secretary to "record the proceedings at all meetings, keep the by-laws and the charter of the company," and that it was not alleged that any vote was taken on any proposition to change the by-laws, and they contend that Robert Horner, not being personally present at the meeting of June 5, 1902, which was a special one called merely for the purpose of accepting the resignations of the officers of the company, was not bound by the agreement alleged to have been made with reference to the holding of the annual meeting in February instead of October of each year. They also point out and lay stress upon the fact that the by-laws provide that "all motions to alter, vary or add to these by-laws * * * shall require a three-fourth vote of the shares of the company," and contend, upon authorities cited, that a by-law can be amended only in the manner called for. Counsel urge with much force and reason that courts should be slow to find regularly adopted by-laws of a corporation to have been changed by "haphazard" and "slipshod" methods, and that it would only be reasonable to hold that by-laws are to be altered only in the manner prescribed in the by-laws themselves and after notice to the stockholders of the intention to amend them.

On the other hand, as above stated, the return shows that the petitioner has all along known that since 1902 no annual meeting of the company has been called for the month of October, but that the meeting has been held in February of each year, and that the petitioner acquiesced and participated in the change. Conceding that the petitioner was not bound by the understanding reached at the meeting of June 5, 1902, and, notwithstanding the agreement, might have insisted on

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the observance of the by-law, it appears that he did not take that course, but remained silent until November, 1911, when he requested that the annual meeting be called forthwith. The importance of the petitioner's conduct in this regard is illustrated by the case of *Elkins v. Camden Railroad Co.*, 36 N. J. E. 467. In that case a board of directors acting without authority adopted a by-law changing the date for holding the annual meeting of the stockholders, and the court held that the stockholders, by meeting on the changed date and proceeding without protest or objection, must be regarded as having assented to the change, and that subsequent meetings should be held on the day so fixed. Subsequently to that change the directors attempted by resolution to again change the time of the annual meeting, the effect of which change would have been to prolong their term of office, and it was ruled that the change should be enjoined at the instance of an objecting stockholder.

By-laws are adopted for the regulation of the business of the corporation and the conduct of its officers. They are obligatory on all the stockholders, but, like the terms of a contract, some or all of them may, by the unanimous mutual consent of the parties be waived or set aside for the time being or permanently amended, and an agreement to so set aside or amend a by-law may be shown by acts and conduct as well as by words.

It has been held that unless it is otherwise provided by statute or the terms of the articles of association by-laws may be adopted by the acts and conduct of the corporation as well as by express vote or adoption in writing. *Graebner v. Post*, 119 Wis. 392; *Myar v. Poe* (Ark.), 95 S. W. 1005; *Bank v. Pinson*, 58 Miss. 421, 439; *Marsh v. Mathias*, 19 Utah 350. In *Buck v. Troy Aqueduct Co.*, 76 Vt. 75, 80, it was said, "that a by-law may be modified by unanimous consent of the stockholders to a regular course of corporate action inconsistent therewith is well settled."

In the case at bar it is immaterial whether the by-law in question be regarded as having been permanently amended or

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merely set aside for the time being. The meeting held on the 25th day of February, 1911, at which the present officers of the corporation were elected, was called as an annual meeting. It was not an adjourned meeting originally called for October. It is alleged in the return that Robert Horner's stock was "present" at that meeting. We understand the allegation to mean that the petitioner's stock was represented and voted at that meeting, and, therefore, that the petitioner participated in the election of officers then held. The officers so elected were, according to a by-law the validity and effectiveness of which is not questioned, elected to "hold office for one year from their appointment and thereafter until the appointment of their successors." Under such circumstances, we feel satisfied, the term of office of the present officers cannot be terminated within the year at the will of the petitioner though he be the owner of a majority of the shares of the corporation.

The motion to quash the return was improperly granted. The order appealed from is set aside and the case remanded to the circuit judge for further proceedings conformable hereto.

A. L. Castle and C. H. Olson (Castle & Withington and Holmes, Stanley & Olson on the brief) for Robert Horner.

A. A. Wilder and C. S. Carlsmith (Thompson, Wilder, Watson & Lymer and C. S. Carlsmith on the brief) for Kukaiiau Plantation Company, Limited, and Albert Horner.

THE TERRITORY OF HAWAII *v.* A. H. DONDERO.

APPEAL FROM DISTRICT MAGISTRATE OF HONOLULU.

ARGUED JANUARY 29, 1912.

DECIDED FEBRUARY 13, 1912.

ROBERTSON, C.J., DE BOLT, J., AND CIRCUIT JUDGE ROBINSON IN PLACE OF PERRY, J.

MUNICIPAL CORPORATIONS—*powers of board—rules of procedure.*

A municipal board can neither enlarge nor restrict its charter powers. A so-called rule of procedure, which purports to restrict

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the powers of the municipality is without force as against the validity of an ordinance passed in pursuance of statutory authority.

Id.—rules not invoked—how waived.

A municipal board may waive its rules of procedure, either by formal action, or by failure to invoke them, or by ignoring them, if no objection is interposed.

Id.—ordinance, title of.

The title of an ordinance is sufficient if it fairly indicates to the ordinary mind the general subject of the ordinance, is comprehensive enough to reasonably cover all its provisions, and is not calculated to mislead.

Id.—ordinance in conflict with statute.

No ordinance shall be held invalid on the ground that it covers any subject or matter embraced within any statute or statutes of the Territory, whether such ordinance is in conflict with any such statute or statutes or otherwise.

OPINION OF THE COURT BY DE BOLT, J.

The defendant was convicted and adjudged to pay a fine of fifteen dollars and costs by the district magistrate of Honolulu for the violation of section 29 of ordinance No. 11 of the City and County of Honolulu, the specific act of the defendant upon which the conviction was based being the operating of a motor car at a greater rate of speed than fifteen miles an hour within a restricted area in the City and County of Honolulu.

Upon conviction, the defendant appealed on points of law from the judgment of the district magistrate to this court. Three questions are presented by the appeal for our consideration, namely: (1) Is the ordinance void because passed in violation of section 2 of rule 20 of the rules of procedure of the board of supervisors of the City and County of Honolulu? (2) Is the ordinance void because in violation of section 15 of the charter of the City and County of Honolulu (Act 118, Laws of 1907), relating to the requirement that ordinances shall embrace but one subject which shall be expressed in the title? (3) Is the ordinance void because in conflict with sections 3115 and 3116 of the Revised Laws, as amended by Act 68 of the Laws of 1907, relating to the driving of vehicles? These questions will be considered in the order named.

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1. The first question for consideration involves the validity of the ordinance, because passed in violation of section 2 of rule 20 of the rules of procedure of the board of supervisors.

We wish, first, to observe with regard to this rule that it is not clear that it is judicially before us; however, we will assume for the purposes of this case, that it is properly before us.

Section 2 of the rule reads: "No ordinance shall be passed that is in conflict with the laws of the Territory and the rules and regulations of the Territorial board of health."

Assuming that the ordinance was passed in violation of the rule and is in conflict with the laws of the Territory, the point which the defendant seeks to make has no force; because, whatever power the City and County of Honolulu may desire to exercise must be looked for in its charter and legislative amendments thereto. The charter provides that the board shall "establish rules for its proceedings," but the rule in question does not purport to be a rule of procedure; it relates solely to the question of power, a subject which the board, as already suggested, is without authority either to enlarge or restrict, and which is governed entirely by legislative enactments. In *Ex parte Mayor of Albany*, 23 Wend. (N. Y.) 276, 279, the court said: "It is enough for us to see that the jurisdictional limits prescribed by the state law have not been overgone. The objection is entirely novel, that a by-law passed by a corporation, prescribing to itself certain conditions on which alone an improvement shall be undertaken, or any other regulation made by it, shall so hamper and cripple its powers, as to disable it from performing those duties enjoined or authorized by the law of the state. The latter is the charter, the constitution, the organic law of the city; and a by-law, which in terms restricts any of its provisions, is equally void, as if it sought to enlarge them."

It is fundamental that a municipality can neither enlarge nor restrict its charter powers. Statutory or charter regulations, being imposed by law, may not be either repealed, sus-

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pended, or ignored by a municipal board. 28 Cyc. 333; *Carr v. City of St. Louis*, 9 Mo. 191; *State v. Archibald*, 5 N. D. 359, 378. It is clear that the rule in question is without force as against the validity of the ordinance. Assuming, however, the rule to be a mere rule of procedure, the record before us fails to show that it was invoked at any time during the consideration or passage of the ordinance, or that any objection was interposed to the passage of the ordinance on the ground that it was in violation of the rule. It is almost uniformly held that a municipal board may waive or suspend its rules of procedure. Such waiver may be brought about either by formal action on the part of the board or by ignoring of the rules without objection. If an ordinance is passed without violation of statutory requirements, but in violation merely of a rule of procedure, it will not be held invalid for that reason. 28 Cyc. 333; *City of Sedalia v. Scott*, 78 S. W. 276; *Holt v. City Council of Somerville*, 127 Mass. 408, 411. Cushing, in his manual, "Law and Procedure of Legislative Assemblies," sections 784, 1478, et seq., lays down the provision that rules, when they are not prescribed by any authority superior to the body adopting them, as in the case at bar, may be suspended by unanimous consent. In section 794, the author says: "But, though it is essential to regularity of proceeding, that a legislative assembly should possess rules for its government, and that every member should have the right to insist upon their observance, yet a member may waive his right, and the assembly itself, on a proper occasion, may dispense with its own rules. Hence it is an established practice, in all our legislative assemblies, to do any matter, or to take any course of proceeding, which is contrary to the rules, provided it is done by general consent; that is, no member interposing any objection."

The cases cited by the defendant on this question do not support his contention: In *Erie R. R. Co. v. Patterson*, 76 Atl. 1065, the proceedings before the municipal council were for the purpose of opening a street which the court held imposed an

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additional burden on the land adjacent and were judicial in character and were such that interested parties were entitled to a hearing, and such a hearing as would come within the definition of due process of law. The court said that the method adopted was well calculated to lull the interested parties into security and deprive them of the opportunity even to ask for a hearing. There was something deeper involved in that case than the mere question of waiver of rules. The particular rules prescribed were part of that "due process of law" necessary under the fifth amendment of the Constitution of the United States before an individual could be deprived of property or property rights. This "due process" as established, the interested parties had a right to rely on, and of course it could not be changed or ignored except in a formal manner and upon due notice to the interested parties. The syllabus of the opinion of the court in that case is as follows: "Where the rules of a public body require action at two regular meetings, and fixed the days for regular meetings, action had on a day not so fixed is nugatory, where the proceedings are judicial in character, although all the members of the Board have previously agreed to meet on the latter day. Such meeting is not a 'regular meeting.'" In *Hicks v. Long Branch Commission*, 69 N. J. L. 300, while it is true the court held, that a rule of the Long Branch Commission, that "on every vote relating to any special appropriation the yeas and nays shall be taken and recorded," is as binding on the commission as any statute, but an examination of the case will show that a compliance with this rule was called for when the resolution was put before the board, and there being objection interposed at the proper time there was of course no waiver. In *State v. Hoyt*, 2 Ore. 247, a councilman voted for himself for the office of marshal in violation of a rule prohibiting any interested party from voting for himself. This was clearly vicious and against public policy. The court said that he "should not be permitted to gain by his own wrong."

Therefore, whether we view the rule as an attempt to restrict

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the power of the board, or as a mere rule of procedure, it is clear that the contention of the defendant upon this phase of the case is entirely without merit.

2. The next question for consideration is the contention of the defendant that the ordinance is void because in violation of section 15 of the charter of the City and County of Honolulu. Section 15 reads: "No ordinance shall embrace but one subject, which subject shall be expressed in its title. If any subject be embraced in an ordinance and not expressed in its title, such ordinance shall be void only as to so much thereof as is not expressed in its title."

The title of the ordinance is as follows: "An ordinance regulating moving travel and traffic upon the streets and other public places of the City and County of Honolulu, providing for the registration, identification, use and operation of motor cars, and providing penalties for any violation of the ordinance."

Section 29 of the ordinance reads: "It shall be unlawful for any person to ride, drive, propel, or operate any vehicle or vehicles upon the streets at a rate of speed greater than is reasonable and proper, having due regard to the traffic and use of the highways, or so as to imperil the life or limb of any person or the safety of any property. No person shall operate a motor car on any public street in the District of Honolulu at a rate of speed greater than twenty-five miles an hour, nor on any public street in said District within the area bounded on the makai side by the sea, on the Waikiki side by Kapiolani Street and Ward Street, and the extension of the line of Ward Street to the sea; on the mauka side by Vineyard Street and the extension of the line thereof to Kapiolani Street, and on the Ewa side by the Asylum Road and the extension of the line thereof to the sea, at a rate of speed greater than fifteen miles an hour; nor at any street crossing within said area at a greater speed than ten miles an hour; nor on the Pali Road between the Government Electric Light Station and the top of said Pali Road at a rate of speed greater than fifteen miles an hour, nor anywhere within

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the City and County of Honolulu, either within or without said area, at a rate of speed greater than is reasonable and proper, having regard to the width and grade of the highway, the grade of adjoining declivities and the traffic and occupation of the street by others; or so as to endanger the life or limb of any person or the safety of property."

As to the title of the ordinance, the defendant contends that it is double, that the expressions therein, namely, "regulating moving travel and traffic," and the provision, "for the registration, identification, use and operation of motor cars," are separate and distinct provisions, each expressing a single subject, and that, therefore, the ordinance is void. He also contends that, even though the title expresses but a single subject, many of the sections in the ordinance, including section 29 as to rate of speed which motor cars may maintain, go beyond the scope of the title; and, therefore, section 29 is inoperative.

We shall, first, consider the question as to the sufficiency of the title to the ordinance, and then, if the title shall be found sufficient, determine whether section 29 falls within the scope of the title.

It may be stated as a general proposition that the expression of subject in the title of an ordinance is sufficient if it calls attention to the general subject of the legislation. It is not necessary that the title refer to details within the general subject, nor those which may be reasonably considered as appropriately incident thereto, and the title is sufficient if it is germane to the one controlling subject of the ordinance. The crucial test of sufficiency of title is generally found in the answer to the question: Does the title tend to mislead or deceive the people or the municipal board as to the purpose or effect of the legislation, or to conceal or obscure the same? If it does, then the ordinance is void; if not, it is valid. 28 Cyc. 379, 380.

In *State v. Calloway*, 11 Idaho 719, 4 L. R. A. (N. S.) 109, the court, in construing an ordinance entitled: "An ordinance regulating the hours in which intoxicating liquors shall be

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sold in Boise City, and for Sunday closing, and providing for a penalty for the sale thereof during prohibited hours," and which ordinance contained provisions relative to the locking and securing of doors, the sale of intoxicating liquors during certain prohibited hours, and the admission of persons into places where intoxicating liquors were sold during such prohibited hours, said: "The object and purpose of the title is to show the general character of the ordinance, so that any one may not be misled thereby. It is well settled that matters of detail need not be specified in the title, nor it need not catalogue all of the powers intended to be bestowed. (Citing cases.) The title is sufficient."

An ordinance of the City of St. Louis contained provisions relative to the sale of milk, its quality, its inspection, and requiring the registration of milk venders. The ordinance was entitled, "An ordinance to license and regulate the sale of milk and cream, to provide for the inspection thereof, and prescribe penalties to prevent the sale and distribution of any but pure, wholesome milk and cream, and to fix the minimum limit of its composition and defining its quality." The supreme court of Missouri, in construing this ordinance in the case of *St. Louis v. Liessing*, 190 Mo. 464, 1 L. R. A. (N. S.) 918, 925, said: "All the provisions of the ordinance are germane to the one subject of regulating the business of vending milk and cream, and the generality of the title is not an objection, so long as it is not made to cover legislation incongruous in itself. Sound policy and legislative convenience dictate a liberal construction of the title and subject-matter of enactments to maintain their validity. There is but one subject to this ordinance, and that is clearly expressed in the title."

As in the St. Louis ordinance, *supra*, requiring the registration of milk venders, so in the ordinance in the case at bar there are provisions requiring the registration and identification of motor cars. In the matter of regulating moving travel and traffic in populous communities, and upon crowded streets and

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thoroughfares, the matter of registration is an important part of the regulation pertaining to the use, operation and speed of motor cars, because, without registration and provisions requiring the display of proper registered car numbers it would often be impossible to identify violaters of the ordinance, or to enforce its provisions. Obviously, the requirement for registration and identification of motor cars is germane to regulating moving travel and traffic; it is essential as well as incidental to the one controlling subject of the ordinance, without which the ordinance would be incomplete and difficult to enforce.

In *Village of St. Anthony v. Brandon*, 10 Idaho 205, the court held that the title to an ordinance, namely, "An ordinance regulating and licensing liquor dealers within the village of 'St. Anthony,'" was sufficient, where the ordinance provided for the payment of a fixed sum for retail liquor dealers only, and prohibited the business of running a restaurant or lunch counter in connection therewith, or in the same room, and also required the doors to be closed on Sunday, and also prohibited music, singing and dancing in the room occupied as a saloon. The court said: "It is urged that this ordinance attempts to regulate other classes of business. We do not so construe its language. There is no attempt to regulate any business, except that of retail liquor dealers."

The title of a Baltimore city ordinance authorized the repaving of a street, declared that the paving should be done with asphalt, while the body of the ordinance contained a proviso permitting the use of vitrified brick in lieu of asphalt in the gutters and on such other portions of the street as, in the judgment of the city engineer, should be necessary or desirable. In *City of Baltimore v. Stewart*, 92 Md. 535, 48 Atl. 165, it was held that this title did not violate a provision of the city charter, declaring that the subject of every ordinance should be described in its title, since it was not necessary to specify matters of detail. In *City of St. Louis v. Weitzel*, 130 Mo. 600, 31 S. W. 1045, the court, construing a city ordinance entitled

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"An ordinance regulating the keeping, storing and handling, and licensing the removal of garbage, * * * and to repeal" a prior ordinance on the same subject, "and prescribing the penalties for the violation thereof," said that this did not violate a charter provision that no bill should contain more than one subject, which should be clearly expressed in its title. "If those words," the court says on page 616 of the decision, "only constitute one general subject, if they do not mislead as to what the bill contains, if they are not designed as a cover to vicious and incongruous legislation, then the title can stand on its own merits, is an honest title and does not impinge on constitutional prohibitions. In the case of *St. Louis v. Grafeman Dairy Co.*, 1 L. R. A. (N. S.) 936, 939, it was held that a proviso requiring the registration of venders and the payment of a registration fee is within the title of an ordinance, "regulating the sale of milk and cream," the court in that connection expressing itself as follows: "We have no hesitancy in holding that the statement, in so far as it charged a failure to pay the \$1 registration and inspection fee, stated a good cause of action, and therefore the criminal court of correction erred in quashing the whole case; nor is this section obnoxious to the objection that it infringes the charter provisions requiring the subject-matter to be expressed in the title of the ordinance. This provision of the ordinance is clearly within the title and germane to the one controlling subject of regulating the sale of milk and cream." In the case at bar, unlike the case just cited, registration is specifically mentioned in the title as well as in the body of the ordinance.

The ordinance in question comprises forty-eight sections, and contains many provisions and matters of detail, including provisions for the registration, identification and speed of motor cars, the controlling subject of which ordinance is the regulation of moving travel and traffic upon the streets and other public places of the City and County of Honolulu. Section 46 thereof provides that "any person who shall violate any of the pro-

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visions of this ordinance shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by fine of not less than \$5.00 nor more than \$250.00, or by imprisonment for a term not exceeding ninety days, or both such fine and imprisonment." The punishment thus provided for is within the limits prescribed by the charter.

Upon this phase of the case, i. e., the sufficiency of the title of the ordinance, the defendant cites *Mo. Pac. Railway Co. v. City of Wyandotte*, 44 Kan. 32, and *Territory v. Furubayashi*, 20 Haw. 559. In the Kansas case, the title of the ordinance reads: "An ordinance extending the limits of the City of Wyandotte, Kansas, and appropriating funds to aid in building Riverview Bridge." The court said: "This much can be said about this particular city ordinance, beyond criticism or doubt. Both the title to and the body of the ordinance contain two separate, distinct and independent subjects, having no connection with each other, and as easily distinguishable from each other as is a stack of wheat from the Argentine smelter."

Under the authority of the *Furubayashi* case the defendant seeks to exclude section 29 from the ordinance and have it rendered inoperative on the theory that it treats of a matter not properly expressed in the title, namely, the lawful rate of speed for motor cars. It is difficult to perceive how the regulation of "moving travel and traffic" upon the streets does not necessarily have to do with the speed of the vehicles constituting such moving travel and traffic. The title clearly has reference to the use, movement and speed of motor cars. In the *Furubayashi* case we held: "It is sufficient if the title of an ordinance fairly indicates to the ordinary mind the general subject of the act, is comprehensive enough to reasonably cover all its provisions, and is not calculated to mislead; but an act which contains provisions neither suggested by the title, nor germane to the subject expressed therein, is, to that extent void."

We therefore conclude, as to this question, that the title of the ordinance is sufficient, that it expresses but one subject,

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that all the provisions of section 29 fall within the scope of the title, and that every portion of the title and every provision of section 29 is germane to the one controlling subject of regulating moving travel and traffic upon the streets and public places of the City and County of Honolulu.

3. The final question for consideration is the contention of the defendant that the ordinance is void because in conflict with sections 3115 and 3116 of the Revised Laws, which, as amended, read:

"Section 3115. Furious or heedless; punishment. Whoever furiously or heedlessly of the safety of others, rides any horse or other animal, or drives or conducts any carriage, wagon, buggy, omnibus, cart, bicycle, automobile, motor cycle, locomobile, or other vehicle, and thereby immediately endangers the personal safety of any person, shall be punished by a fine not less than five dollars nor exceeding five hundred.

"Section 3116. Same. Whoever furiously or heedlessly of the safety of others, rides any horse or other animal, or drives or conducts any carriage, wagon, buggy, omnibus, cart, bicycle, automobile, motor cycle, locomobile, or other vehicle, though at the time the personal safety of any person be not endangered thereby, shall be punished by fine not less than five dollars nor exceeding one hundred."

The defendant contends that the ordinance covers the same general ground that the statutory provisions, just quoted, cover and is in conflict with them. Both, as he claims, are aimed at heedless driving. He cites the case of the *Territory v. McCandless*, 18 Haw. 616, decided March 2, 1908, wherein it was held that "a county has no power to prohibit by ordinance an act already made penal by territorial statute." "This," the defendant says in his brief, "would dispose of the present case were it not for certain subsequent legislation"—referring to section 3 of Act 79 and section 1 of Act 99, Laws of 1909; which, he contends, the legislature had no power to enact. The statutory provisions referred to, and which we deem perfectly valid and within the power of the legislature to enact, provide that "No ordinance shall be held invalid on the ground that

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it covers any subject or matter embraced within any statute or statutes of the Territory, whether such ordinance is in conflict with any such statute or statutes or otherwise."

The defendant further contends that, even though the statutory provisions just quoted are valid, the ordinance is void, because, as he argues, there is a lack of special legislative authority authorizing its passage. The deputy city and county attorney contends, however, that such special authority is to be found in paragraph 2 of section 23 of the charter, whereby the board of supervisors are empowered to ordain, make and enforce any ordinance "to regulate and control for any and every purpose, the use of the streets, highways, public thoroughfares, public places, alleys and sidewalks of said City and County," which, as he argues, when read in connection with the statutory provisions of 1909 as above quoted, relating to ordinances conflicting with statutes, shows the intention of the legislature beyond question. The *McCandless* case construed the County Act of 1905, section 62 of which expressly prohibited the passage of any ordinance "in conflict with the general laws of the Territory;" and, presumably, the enactment of the statutory provisions of 1909, as above quoted, was in response to the following language of the court as expressed in the decision in that case on page 623: "If they (ordinances) undertake to penalize acts already made penal by territorial law they should be authorized expressly or by necessary implication." Obviously, the legislature by these statutory provisions of 1909 intended to authorize the passage of ordinances such as the one now under consideration. We may, therefore, assume for the purposes of this case that the ordinance in question is in conflict with sections 3115 and 3116. The defendant, as already stated, questions the power of the legislature to authorize the passage of ordinances covering the same ground, or in conflict with, the general laws of the Territory.

Congress, by the Organic Act, has given the legislature of this Territory broad and comprehensive powers in the matter

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of legislation. In *Castle v. Secretary of the Territory*, 16 Haw. 769, 777, this court said: "The grant of legislative power contained in the Organic Act includes 'all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States locally applicable,' and expressly includes the power to 'create counties and town and city municipalities and provide for the government thereof.' There is no limitation upon this power except as found in the provisions of the Organic Act and in the Constitution."

Neither in the enactment of the statutory provisions of 1909, referred to, nor in the passage of the ordinance in question, was the Organic Act, nor any constitutional or other fundamental principle violated. We entertain no doubt but that the legislature has ample power to authorize the passage of ordinances such as the one now before us. And that the legislature by the statutory provisions referred to intended to authorize the passage of the ordinance in question is clear beyond question.

In *Haynes v. Cape May*, 50 N. J. L. 55, the court said: "There are circumstances under which the court will inquire into the reasonableness of ordinances passed by a municipal body under legislative powers granted to it." Those circumstances exist when the powers granted by the legislature are expressed in terms general and indefinite. But where the legislature has defined the delegated powers and prescribed with precision the penalties that may be imposed, an ordinance within the powers granted prescribing a penalty within the designated limit, cannot be set aside as unreasonable."

That the matter is one entirely controlled by the charter and rests entirely upon the ascertainment of the intention of the legislature is shown by the case of *Lore v. Holmes* (Miss.), 44 So. 835. In that case it was held that a city operating under a special charter may, under the Mississippi Annotated Code of 1892, section 3039, as amended, authorizing such a city to amend its charter, providing the amendments are not

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in conflict with the laws or Constitution of the United States or constitution of the State, though they are inconsistent with the code chapter entitled "Municipalities," adopt an amendment for the owning and operating by the city of an electric railway and for issuing bonds therefor. In commenting upon the fact that the action of the city was inconsistent with the state statutes, the court in that case said: "The act expressly provides that it may make amendments that are inconsistent with the chapter on 'Municipalities' as provided in the code."

In *People v. Earl*, 42 Colo. 238, 94 Pac. 294, the court said: "Except as limited or controlled by constitutional provisions, the General Assembly is omnipotent in relation to municipal corporations within the state. It calls them into being, and endows them with whatever powers and privileges they possess. If in its judgment advisable, their existence, even, may at any time be absolutely terminated. In these and other particulars it bows only to the superior behests of the people expressed in their organic law."

In Texas, the legislature conferred on cities certain powers relative to the "recall," and the supreme court of that State, in *Bonner v. Belsterling*, 138 S. W. 571, held, that except as limited by the Constitution of the United States and the constitution of the State of Texas, the legislature could confer upon municipal government any power that it might see fit to give.

There seems to be no question but that the legislature may delegate to a municipality power to regulate by ordinance subjects which are already covered by statute. See *Theisen v. McDavid*, 34 Fla. 440; 26 L. R. A. 234, 16 So. 321; *Hood v. Von Glahn*, 88 Ga. 405, 14 S. E. 564; *Re Jahn*, 55 Kans. 694, 41 Pac. 956; *Rogers v. Jones*, 1 Wend. 237; *Brooklyn v. Toynbee*, 31 Barb. 282; *Ex parte Douglass*, 1 Utah 108.

A municipal by-law enacted pursuant to a special charter authority has the same force and effect as a law within the municipal boundaries as though it had been enacted by the

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general assembly. *McCormick v. Columbia Electric St. Ry. Light & Power Co.*, 85 S. C. 455, 67 S. E. 562.

A territorial case, *Burmeister v. Howard*, 1 Wash. Ter. 208, 215, states the matter as follows: "Municipal ordinances are akin to legislative enactments; a municipal corporation resembling a legislature, their charter representing the constitution of a state, an *imperium in imperio*, and therefore those ordinances within the sphere of their charter have all the force of statutes and within the limits of its authority all persons are bound by the acts of the corporation."

As the question must be examined solely in the light of the intention of the legislature, if that intention is clear, a municipality may have the right to pass ordinances upon specific subjects even though such ordinances are inconsistent with existing statutes, and nullify or supersede them. The courts, however, generally, unless the intent of the legislature is so clearly expressed as to be beyond question, sustain both the statute and the ordinance, although they may be in conflict. One line of decisions holds that there is a concurrent jurisdiction, and that a conviction under an ordinance is a bar to a prosecution under a statute, and vice versa. Another line of authorities holds also that the jurisdiction is no bar to a prosecution under the other, the theory being that although the acts are the same there are in fact two offenses separate and distinct, one against the dignity of the state and the other against the dignity of the municipality. In the case at bar, however, we are not required to express any opinion as to which of these theories is the correct one, because there is no attempt to carry on more than one prosecution at this time, nor has it been suggested that the defendant has already been prosecuted under any other statutory authority. It will be time enough to decide the questions suggested when they come properly before us.

In *Hall v. Dunn*, 52 Ore. 475, 25 L. R. A. (N. S.) 193, 198, 200, it appears that the statute involved contained a provision that the municipality might enact ordinances concern-

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ing a particular subject, "Irrespective of any general law of the state upon the subject." The legislative assembly passed a law on February 7, 1905, repealing the act of incorporation of Medford, and granted a charter in lieu thereof. The later act conferred upon the common council the power "To license, tax, regulate or prohibit barrooms, drinking shops, billiard rooms, bowling alleys, dance houses, and all places where spirituous, malt or vinous liquors are sold or kept for sale, irrespective of any general law of the state on this subject, enacted by the legislature or by the people at large: Provided, that no license for the sale of spirituous, malt or vinous liquors shall be granted for any less amount than is or may be provided by the general laws of the state in force at the time of the granting thereof. Held, that the re-enactment by the legislature of a clause of a municipal charter after the passage of a general law in conflict therewith will have the effect of re-establishing it, if to the provisions is added the clause 'Irrespective of any general law of the state upon the subject.'" The clause, "irrespective of any general law of the state upon the subject," just quoted, is substantially the same, in meaning, as the statutory provisions of 1909, above referred to.

A section in the charter of an Indiana city gave to the common council exclusive power over streets, etc. The supreme court of Indiana in the case of *Wood v. Mears*, 12 Ind. 515, after recognizing that if the authority is sufficient municipalities may pass ordinances conflicting with statutes, says: "This section confers upon the common council plenary powers over the streets and alleys of the city. * * * In the language of Harris, J., in the case of *Milhou v. Sharp*, 17 Barb. 437, * * * 'In this respect it (the municipality) is endowed with legislative sovereignty: The exercise of that sovereignty has no limits so long as it is within the objects and trusts for which the power is conferred.'"

A general discussion of the subject as to the power of municipalities, operating under the so-called general welfare

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clause, as well as those operating under special authority, will be found in 2 Dillon on Municipal Corporations, (5th ed.) §§630-634; 28 Cyc. 365-368. See also, *In re Sic*, 73 Cal. 142; *State v. Preston*, 4 Idaho 215; *Bennett v. People*, 30 Ill. 389; *Siebold v. People*, 86 Ill. 33; *City of Seattle v. Chin Let*, 19 Wash. 38; *Ex Parte Pfahler*, 150 Cal. 71, 11 L. R. A. (N. S.) 1092; *City of Bellingham v. Cissna*, 44 Wash. 397; *State v. Ludwig*, 21 Minn. 202; *Brooklyn v. Toynbee*, 31 Barb. 282; *Wightman v. State*, 10 Ohio 452; *Berry v. People*, 36 Ill. 423; *Ehrlick v. Com.* (Ky.) 102 S. W. 289, 10 L. R. A. (N. S.) 995; *In re Henry*, 15 Idaho 755, 21 L. R. A. (N. S.) 209; *Shafer v. Mumma*, 17 Md. 331; *Gardner v. People*, 20 Ill. 430; *Rice v. State*, 3 Kan. 141; *Bowles v. District of Columbia*, 22 App. D. C. 321.

The cases cited by the defendant upon this phase of the case do not sustain his contention: In *Landis v. Borough of Vine-land*, 54 N. J. L. 75, the court merely held that an ordinance which provided a penalty inconsistent with the penalty prescribed in the charter was void. In *Washington v. Hammond*, 76 N. C. 33, the court held that municipal ordinances and by-laws must be in harmony with the general laws of the state, but also said: "The question does not arise in our case whether the state may not expressly confer upon a municipal corporation the power to pass local laws which should exclude the general laws of the state on particular and enumerated subjects. By-laws and state laws may stand together, if not inconsistent, and possibly the same act may constitute an offense both against the state and municipal law and both may be punished if the by-law is strictly a police regulation only."

In *State v. Langston*, 88 N. C. 692, the court held that "A general grant of power, such as a mere authority to make by-laws, or to make by-laws for the good government of the place, and the like, should not be held to confer authority upon the corporation to make an ordinance punishing an act; for example, an assault and battery, which is made punishable as a

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criminal offense by the laws of the state. 1 Dill. on Mun. Corp. §302. The power conferred upon the municipal body is presumed to be in subordination to a public law regulating the same matter for the entire state, unless a clear intent to the contrary is manifest." The doctrine thus enunciated is recognized by all the authorities. The case simply marks the clear distinction between general and special powers of municipalities. 1 Dill. on Mun. Corp. (4th ed) p. 395, has no bearing upon this question. *Haywood v. Mayor*, 12 Ga. 410, involved the construction of an ordinance passed under a general power, and has no application as an authority in the case at bar. *King v. Company of Barber Surgeons*, 91 Eng. Rep. (full reprint) 1291, involved the question of a violation by the united barbers and surgeons of an express provision of their charter, and, of course, has no application in this case. In *State v. Fourcade*, 13 So. 187, as well as in *McInerney v. City of Denver*, 29 Pac. (Colo.) 516, it was held that the legislature may delegate to municipalities power to enforce and adopt ordinances of special local importance, though general statutes exist; that the same act may constitute two offenses, and that the municipality and the state may both punish without violation of the constitutional inhibition against placing one twice in jeopardy for the same offense. 2 Dill. on Mun. Corp. (5th ed.) §§587, 589, 602, 607, which he cites, covers various phases of the questions which have arisen, and sheds much light upon questions involved in this case. He also, in his reply brief, cites a number of cases upon the following propositions, that an ordinance of the City and County of Honolulu would be void: (1) when in conflict with the Constitution of the United States; (2) when in conflict with the Organic Act; (3) when in conflict with the statutes of the Territory; and (4) when in conflict with fundamental principles. The ordinance before us, as we have already pointed out, except as to the third proposition, is free from the objections mentioned. As to the third proposition, we have disposed of

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that question on the ground that it is immaterial whether the ordinance is in conflict with the statutes of the Territory or not. Therefore, the authorities cited have no application to the case before us.

In conclusion it may be observed, that the territorial legislature, pursuant to congressional authority, having expressly empowered the City and County of Honolulu to make and enforce all necessary ordinances covering all local police matters, to protect health, life and property, to preserve and enforce the good government, order and security of the inhabitants thereof, to regulate and control for any and every purpose, the use of the streets, highways, public thoroughfares, public places, alleys and sidewalks therein, to prescribe fines, forfeitures and penalties for the breach of any ordinance, not to exceed the amount of five hundred dollars or six months' imprisonment, or both, and having also expressly enacted, that "no ordinance shall be held invalid on the ground that it covers any subject or matter embraced within any statute or statutes of the Territory whether such ordinance is in conflict with any such statute or statutes or otherwise," it follows, therefore, that ordinance No. 11 of the City and County of Honolulu is valid.

The judgment of the district magistrate is affirmed.

F. W. Milverton, Deputy City and County Attorney (J. W. Cathcart, City and County Attorney, with him on the brief), for the Territory.

Thompson, Wilder, Watson & Lymer for defendant submit the case on a brief.

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TERRITORY OF HAWAII v. HOY CHONG.

ERROR TO DISTRICT MAGISTRATE OF HONOLULU.

ARGUED FEBRUARY 16, 1912.

DECIDED FEBRUARY 19, 1912.

ROBERTSON, C.J., DE BOLT, J., AND CIRCUIT JUDGE COOPER
IN PLACE OF PERRY, J.

FISH—*close season for amaama.*

The preservation of fish is within the proper domain of the police power. The legislature may provide by statute for a close season for the protection of *amaama* notwithstanding the declaration contained in section 95 of the Organic Act.

SAME—*sale of fish taken from a private pond.*

The prohibition against selling *amaama* during the close season contained in Act 110, Laws of 1911, will apply to fish taken from a private pond unless it is made to appear that there is no passage-way connecting such pond with the sea, or other waters, through which *amaama* may pass. The sale of *amaama* taken from privately owned ponds during the close season may be prohibited if such prohibition is found to be necessary in the endeavor to protect the *amaama* of the sea waters of the Territory.

CONSTITUTIONAL LAW—*invalidity of portion of statute.*

The invalidity of a portion of a statute will not defeat the whole act if the unobjectionable part is separable, complete and capable of enforcement.

OPINION OF THE COURT BY ROBERTSON, C.J.

The charge upon which the plaintiff-in-error was tried and convicted in the court below was that he "did at Honolulu, city and county of Honolulu, Territory of Hawaii, during one week last past prior to and including the 29th day of December, A. D. 1911, unlawfully and wilfully expose and offer for sale certain fish known as *amaama*, contrary to Act 110, Laws of the Territory of Hawaii, Session of 1911."

The first section of the act in question provides, "That it shall be unlawful for any person to fish for or take, or to be engaged in the fishing for or taking from any of the waters within said Territory, except as hereinafter provided, *amaama*,

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during any time from December 1st to March 1st, inclusive, in any year. And it shall likewise be unlawful for any person to expose or offer for sale, to have in possession for the purpose of exposing or offering for sale any *amaama*, during or within any of the times stated in this section; provided, however, that the prohibition of this section against the fishing for or taking of *amaama* shall not extend or be applicable to the owners or lessees of enclosed fish ponds privately owned."

The defendant demurred to the charge on the grounds that the statute is ambiguous; unintelligible, uncertain and indefinite; is contrary to the Fifth and Fourteenth Amendments to the Constitution, and is class legislation; also that it is contrary to section 95 of the Organic Act of Hawaii. The demurrer was overruled.

The testimony showed that the defendant, at the time and place alleged in the charge, exposed for sale and sold *amaama*; that they were "pond" *amaama* from the Maunalua fish pond, which pond is privately owned by the Bishop Estate; that *amaama* do not propagate in ponds; that the young *amaama* in privately owned ponds are collected at the outlets known as *makahas* and then put into the ponds where they grow, and from which they are subsequently taken for the market.

The three principal points made by counsel for the plaintiff-in-error are that Act 110 of the Laws of 1911 is contrary to that provision of the Organic Act (Sec. 95) which declares that, subject to vested rights, all fisheries in the sea waters of the Territory, not included in any fish pond or artificial inclosure shall be free to all citizens of the United States; that the act constitutes class legislation in violation of the first section of the Fourteenth Amendment, in that it discriminates against persons who are not the owners or lessees of enclosed fish ponds privately owned by excepting those mentioned from the provision against fishing or taking fish during the close season; and that the act violates the Fifth Amendment in that by prohibiting the sale of *amaama* within the period stated it

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amounts to a taking of the property of the owners of private fish ponds in which *amaama* are kept without due process of law.

We will take up the points in the order stated, and, first, as to the alleged conflict of the statute with the Organic Act. The object of the statute is well stated in the title to be "To provide a close season for the protection of the fish known as *amaama*." In *Lawton v. Steele*, 152 U. S. 133, it was said that the preservation of game and fish has always been treated as within the proper domain of the police power, and laws prescribing the time and manner in which fish may be caught have been repeatedly upheld by the courts; and that the duty of preserving the fisheries of a State from extinction, by prohibiting exhaustive methods of fishing, or the use of such destructive instruments as are likely to result in the extermination of the young as well as the mature fish is as clear as its power to secure to its citizens, as far as possible, any other wholesome food. In *People v. Bridges*, 142 Ill. 30, 41, the court said: "The power of the legislature to pass laws for the protection and preservation of fish in the waters of the State has been so frequently exercised in this and other States, and such exercise has been so long and so uniformly acquiesced in, that the existence of the power, at the present day, is scarcely open to question."

We hold that a statute having for its object the protection of *amaama*, a valuable food fish, and providing to that end a reasonable close season (and it is not contended that the months of December, January and February constitute an unreasonable close season for *amaama*) is a legitimate exercise of the police power, and within the grant of legislative power contained in section 55 of the Organic Act, and does not conflict in any way with the declaration contained in section 95 of that act. In other words, the declaration that the sea fisheries of the Territory shall be free to all citizens of the United States was not intended to curtail the right of the legislature to enact

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laws in the interest of the public for the protection and preservation of those fisheries.

In connection with the second point raised as above stated, an interesting discussion has been had as to the proper construction to be placed upon the language of the act relating to fishing and the taking of fish. On behalf of the Territory it is argued that the proviso found in the first section of the statute was intended merely to allow the owners and lessees of private ponds to take from their ponds fish for their own use; that the language of the statute is capable of being construed in accordance with such intention; and that such a construction would obviate the alleged discrimination against the taking of fish from the public waters by persons other than the owners and lessees of privately owned ponds. Counsel for plaintiff-in-error claims that the language of the statute is too plain and clear to permit of construction; that the language was used advisedly; and that the intention of the legislature was to exempt the owners and lessees of private ponds from the prohibition against taking fish from the sea waters during the propagating season in order to enable them to stock their ponds with young *amaama* taken from the sea during that season. It appears to us, however, that as the plaintiff-in-error was not put on trial upon a charge of fishing or taking fish from the sea waters in the close season he is not in a position to urge the invalidity of the statute upon the ground advanced. His rights in this case are in no way affected by the alleged discrimination, if it does exist. See *In re Craig*, 20 Haw. 483, 490.

The statute seeks to protect the fish by prohibiting the taking of them and by forbidding the sale of them. We regard the two things as so independent and separable that if for any reason the prohibition against the taking of fish should not be operative the other against selling them might still be effective. Where the legislature has endeavored to accomplish a purpose by two distinct means the failure of one by reason

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of constitutional objections ought not to defeat the operation of the other. See *In re Fernandez*, 12 Haw. 120.

"It is only when different clauses of an act are so dependent upon each other that it is evident that the legislature would not have enacted one of them without the other—as when the two things provided are necessary parts of one system—that the whole act will fall with the invalidity of one clause. When there is no such connection and dependency, the act will stand, though different parts of it are rejected." *Huntington v. Worthen*, 120 U. S. 97, 102. If, after striking out the unconstitutional part of a statute, the residue is intelligible, complete, and capable of execution, it will be upheld and enforced, except, of course, in cases where it is apparent that the rejected part was an inducement to the adoption of the remainder." *Scott v. Flowers*, 61 Neb. 620, 623. There is no reason for supposing that the legislature would not have prohibited the sale of *amaama* during the propagating season had it been informed that it could not discriminate between owners or lessees of private ponds and others as to the taking of *amaama* from the sea waters of the Territory.

The remaining question is as to the validity of the enactment against the selling of *amaama* as applied to those taken from private ponds. The legislature has the power to regulate the time and manner of taking or selling fish whenever the public interests require such regulation, even though the use of private property may be thereby restricted to some extent. A pond which has neither outlet nor inlet through which fish can pass is the private property of its owner; the public have no interest in it, and a statute prohibiting certain methods of taking fish does not apply to such a pond. *People v. Conrad*, 125 Mich. 1; *State v. Roberts*, 59 N. H. 256. But the legislature, in the endeavor to protect a certain species of fish, may prohibit the sale of all such fish during a close season, and such prohibition may apply to fish taken from privately owned ponds. In the case of *Commonwealth v. Gilbert*, 160

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Mass. 157, it was held that on a charge of selling dead trout during the close season, the accused was not entitled to show in defense that the fish he had sold were artificially propagated, raised and maintained by himself in artificial ponds on his own premises. The court there said: "In order to make the protection of trout more effectual, it was deemed necessary by the legislature to punish the sale, during the close season, of all trout except those which are alive. This was probably on account of the difficulty of distinguishing between trout which had been artificially propagated or maintained and other trout." For a similar reason it has been held that under statutes making it an offense to have in possession game animals or birds at certain times of the year it is no defense that the game was not killed within the state, but was brought in from elsewhere. The idea being that the statute could be easily evaded and rendered ineffectual if it were necessary to prove the time and place of the taking or killing of the game, and there being no way to distinguish it. *Javins v. United States*, 11 App. Cas. D. C. 345; *Ex Parte Maier*, 103 Cal. 476.

In this case it is urged on behalf of the defendant that mullet raised in ponds are distinguishable from sea mullet. The testimony given in the court below was very meager. The prosecution called only one witness and the defendant none. The witness (a fish inspector at the Honolulu market) said on direct examination, "there is some difference between sea mullet and pond mullet," and on cross-examination he said, "you can tell the difference between pond and sea mullet." What the difference in the appearance of the two classes of *amaama* was not explained, nor was it made to appear whether the two kinds are readily distinguishable by the ordinary observer, or is to be noted with difficulty only by the accustomed eye of an expert. The offering for sale of *amaama* by the accused in violation of the statute having been shown, the burden was upon him to produce evidence of any special facts that he relied on to show that the transaction was not within the

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purview of the statute, or that the statute as applied to such facts was an unreasonable regulation and as such void. Otherwise stated, if the accused intended to rely on the fact, if it be a fact, that the difference between pond mullet and sea mullet is to be easily and readily seen, and that the legitimate protection of sea mullet would not justify the prohibition of the sale of all mullet during the close season it was incumbent upon him to show it. He did not do so.

The fact given in evidence that *amaama* do not propagate in ponds is made use of by both sides. The prosecuting attorney contends that the fact that private ponds must be regularly replenished with young fish from the sea waters gives the public an interest in the protection of those fish when they mature. Counsel for the plaintiff-in-error claim that the fact that *amaama* confined in a pond will not spawn renders the preservation of pond mullet unnecessary, and that the object of the statute—the protection of sea *amaama* during the spawning season—does not apply. The fact that pond mullet do not spawn would have afforded a strong reason for holding that the statutory prohibition could not apply to that class of mullet if it had been made to appear that the two classes are readily distinguishable, and also that the pond in question had no connection with the sea through which the mullet could pass. The public has an interest in the fish in ponds which are so connected with other waters, and statutes regulating the taking and selling of fish apply to the fish in such ponds. *People v. Bridges*, supra; *People v. Horling*, 137 Mich. 406. The witness testified that the pond from which the *amaama* in question were taken “is privately owned,” and he testified generally that “the young mullet in these private ponds are collected at the outlets known as *makahas* and then poured into the ponds.” But there was no testimony tending to prove that the pond in question is so situated or so operated that *amaama* cannot pass to and fro between the pond and the sea.

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For the reasons indicated the judgment of the district magistrate is affirmed.

J. L. Coke (Douthitt & Coke on the brief) for plaintiff-in-error.

J. W. Cathcart, City and County Attorney, for defendant-in-error.

HENRY WATERHOUSE TRUST COMPANY, LIMITED, A CORPORATION, *v.* JOHN D. PARIS.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED FEBRUARY 27, 1912.

DECIDED MARCH 4, 1912.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

EVIDENCE—*request to make payment—sufficiency of proof.*

P covenanted that in the event that W should be "held liable by judgment of a court of competent jurisdiction on account of any claim or demand arising out of a certain redelivery bond," describing it, he would "save and hold harmless" the said W "therefrom to the extent of" a sum named. Judgment was rendered against W by a court of competent jurisdiction upon the bond. In an action by A against P upon the covenant, held that a motion for non-suit was incorrectly granted, the evidence being sufficient to support a finding that the judgment was paid by A to the judgment creditor at the request of W and that in consideration of the payment A received from W an assignment of the latter's claim against P.

OPINION OF THE COURT BY PERRY, J.

This is an action to recover \$3079.11 upon an agreement executed by the defendant on September 22, 1904, whereby he covenanted that "in the event that A. B. Wood or the Estate of Henry Waterhouse, deceased, shall be held liable by judgment of a court of competent jurisdiction on account of any claim or demand arising out of a certain redelivery bond exe-

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cuted by Clinton J. Hutchins, Trustee, as Principal, and said A. B. Wood and said Henry Waterhouse, as Sureties, in a suit pending in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, between W. W. Bierce & Company, Limited, Plaintiff, and Clinton J. Hutchins, Trustee, et al., defendants," he would "save and hold harmless * * * the said A. B. Wood and the said Estate of Henry Waterhouse, deceased, therefrom, to the extent of" the sum above named. In the declaration it is alleged that on March 29, 1911, in the circuit court of the first circuit of the Territory of Hawaii, in the suit of *Bierce v. Hutchins* referred to in the agreement, final judgment was rendered against William Waterhouse and Albert Waterhouse, executors of the will of Henry Waterhouse, deceased, for the sum of \$36,002.08, that on April 12, 1911, the judgment was fully paid by the plaintiff at the request of the executors, that in consideration of said payment and the consequent discharge of the executors from all liability thereunder the executors assigned all of their claim and right of action against defendant arising out of the agreement and the rendition and payment of the judgment and that defendant has neglected and refused to pay the amount of his undertaking named in the agreement. At the trial a motion for non-suit was granted and the plaintiff excepted.

In support of the order of non-suit it is urged that no proof was presented of the execution of the instrument (assignment) of April 12, 1911, by the Waterhouse Trust Company and that therefore the copy received in evidence was inadmissible. Objection was made at the trial to the admission of the document, but after discussion of the point by court and counsel the attorney for the defendant said, "If the court please, for the purpose of facilitating the trial of this case and getting along with it we will consent that the assignment introduced in evidence be relied upon for the present, with the distinct understanding that if the original can be produced it will be produced;" and the court thereupon admitted the instrument, saying: "Very well,

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proceed, Mr. Withington, on the stipulation of counsel for the defendant; there being no objection I understand the document may be admitted as Plaintiff's Exhibit 'E.'" The original was not produced and no further attempt was made to have the document excluded. Under these circumstances the assignment must be regarded as having been correctly received.

The contention mainly relied upon to uphold the order is that it appears from the evidence that the plaintiff in paying the judgment was a mere volunteer or at least that the plaintiff did not introduce evidence tending to show that it made the payment at the request of the executors, the judgment debtors, it being conceded by the defendant,—and the law to that effect is clear—that if the payment was at the request of the executors the defendant is liable in this suit upon his undertaking.

The plaintiff's evidence, although meager, was sufficient to support the findings of the following facts: that the judgment was paid by check of the plaintiff delivered to the attorney of the Bierce company; that the payment was made concurrently with or immediately after the execution of the assignment by the executors and its delivery to the plaintiff; that immediately after the payment counsel for the executors received from the attorney for the Bierce company the satisfaction piece for filing in the suit of *Bierce v. Hutchins*; and that all of these acts were part of one transaction. The assignment itself, moreover, recites that it was made by the executors "in consideration of the full payment and satisfaction by the Henry Waterhouse Trust Company, Limited, of the judgment" in question and expressly transfers to the plaintiff "all the right which said Executors or the Estate of Henry Waterhouse, deceased, may have to prosecute the same." From the testimony the jury would have been justified in inferring that the payment was at the request of the executors and so also upon the face of the instrument the inference, as a matter of construction, is to the same effect. Whether this implication arising upon the face of the instrument is rebuttable by extrinsic evidence is a question which does

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not arise. It is sufficient to say for the purposes of these exceptions that no evidence was adduced tending to rebut the inference. Albert Waterhouse, one of the executors, did, it is true, testify that he had not, as executor, ever requested the plaintiff to pay any part of the judgment, but the witness obviously referred in so answering to an express request. He could not successfully undertake to testify concerning the legal effect of the acts of the parties. Likewise the provisions in the instrument that the assignment was "without recourse in any event to said executors (or either of them) for or on account of any costs, expenses or claim of any kind" and that "the executors do not to any extent warrant the collectability of said claims" (against Paris and others) "or any of them, or the extent of their right, title or interest therein or respecting the same," do not require the construction that plaintiff paid the judgment as a mere volunteer. These were precautions competent for the executors to take and were not inconsistent with a request to the trust company to pay.

It is unnecessary to consider whether in addition to a rendition of a judgment against the executors in the *Bierce* case payment by the executors of that judgment was essential to the accrual of a cause of action upon defendant's undertaking, for upon the present state of the evidence the only showing is that the judgment was paid and at the request of the executors.

Upon the evidence adduced the order for a non-suit is set aside. The exception to the order is sustained and a new trial granted.

D. L. Withington (Castle & Withington on the brief) for plaintiff.

C. R. Hemenway (Smith, Warren & Hemenway and Kinney, Prosser, Anderson & Marx on the brief) for defendant.

Territory v. Henriques, 21 Haw. 50.

TERRITORY OF HAWAII v. J. G. HENRIQUES.

EXCEPTIONS FROM CIRCUIT COURT, THIRD CIRCUIT.

SUBMITTED FEBRUARY 26, 1912.

DECIDED MARCH 5, 1912.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

INDICTMENT AND INFORMATION—*common nuisance, sufficiency of information for.*

An information, which charges that defendant did, during a certain period, continually, wilfully and unlawfully turn loose, and continually, wilfully, unlawfully and knowingly permit, "certain dairy cattle" to go abroad, roam about, lie about, graze and assemble together in and upon a certain public highway, thereby obstructing, hindering and disturbing the lawful use thereof, and endangering the safety of the public, is fatally defective, in that it does not show that defendant was the owner of or had control over the cattle referred to.

OPINION OF THE COURT BY DE BOLT, J.

At the April, 1911, term of the circuit court of the third circuit, the deputy county attorney of the County of Hawaii, William H. Heen, presented by way of information that one J. G. Henriques, the defendant, at Kealakekua, in the county and circuit aforesaid, "for and during the period of eighteen months next preceding the 23rd day of April, A. D. 1911, did continue and maintain the offense of common nuisance in that he, the said J. G. Henriques, did at and during the period aforesaid continually, wilfully and unlawfully turn loose and continually, wilfully, unlawfully and knowingly permit certain dairy cattle to go abroad, roam about, lie about, graze and assemble together in and upon the public highway at said Kealakekua, which said public highway runs and lies immediately in front of the residences there situate of one W. J. Yates, of the said J. G. Henriques, of one R. Wallace and of one E. E. Conant, respectively, thereby obstructing the said public highway and hindering and disturbing the lawful use thereof and thereby endangering the safety of the public, to the damage,

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annoyance and vexation of all persons then and there being and then and there lawfully using the said public highway, contrary to the form of the statute in such cases made and provided."

The defendant demurred to the information on the grounds that it did "not contain allegations sufficient to constitute a valid charge of any criminal offense by this defendant, or the violation by defendant of any penal statute of the Territory of Hawaii, or of any ordinance of the county of Hawaii." The demurrer being overruled the defendant excepted, and thereupon he pleaded "not guilty" and went to trial. Considerable evidence was adduced by the prosecution, but none on behalf of the defendant. The jury returned a verdict, finding the defendant guilty of common nuisance in the first degree. The court sentenced the defendant to pay a fine of \$100 and costs.

The information is based upon section 3130 of the Revised Laws, which, omitting the examples therein given, reads: "The offense of common nuisance is the endangering of the public personal safety or health, or doing, causing or promoting, maintaining or continuing what is offensive, or annoying and vexatious, or plainly hurtful to the public, or is a public outrage against common decency or common morality, or tends plainly and directly to the corruption of the morals, honesty and good habits of the people, the same being without authority or justification by law."

The defendant brings the case to this court upon eighteen exceptions, but in the view we take of the exception to the order of the court in overruling the demurrer to the information it will not be necessary to consider the other exceptions.

The demurrer challenges the legal sufficiency of the information as a criminal charge. It presents the question as to whether the information sets forth facts sufficient to constitute the offense of common nuisance as against the defendant.

The defendant contends that the information is fatally defective in that it does not state that the cattle therein referred

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to were his, or that they were in anywise under his control, and that everything alleged in the information might well be true, and still not constitute the offense of common nuisance as charged. This contention, in our opinion, is sound. It is necessary in this, as in all other criminal offenses, that the indictment, information or complaint, set forth all the essential facts, ingredients and elements of the offense charged, with certainty, and describe and identify the same sufficiently to put the defendant on notice as to what he is required to defend. 29 Cyc. 1281, 1282; 12 Cyc. 324, 325; 22 Cyc. 293-296; 2 Bish. New Crim. Proc. §865. "An accusation of crime should not be in doubtful terms, or in outline indistinct, but it should be what our cultivated science of pleading has in fact required; namely, to employ its own word, 'certain.'" 1 Id. §323. "All the ingredients which enter into the offense, whether set down in the statute in terms or interpreted into it, must be stated." Id. §612. "The elements from interpretation of the statute must be just as much covered by the indictment as those in its words." Id. §626.

The force and application of this rule, requiring that all the essential ingredients of an offense charged shall be alleged, was recognized in the case of *The King v. Nahakualii*, 3 Haw. 472, 473, wherein the court said: "An indictment may be good although the words of the statute are not used, provided apt and sufficient words are used in describing the alleged offense, to show that it necessarily comes within the class of offenses described in the statute, and contains all the ingredients of the offense charged."

Ownership or control of the cattle was an essential ingredient of the offense charged and should have been alleged, not merely by implication or intendment, but clearly, directly and positively. Suppose the cattle had belonged to a third party and the defendant, finding them entering his premises from the public highway, turned them out upon the public highway and thus permitted them to go abroad and obstruct the public

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highway, could it be claimed with any show of reason that he thereby committed the offense of common nuisance? See 2 Am. & Eng. Ency. of Law, 357; 2 Cyc. 378. Therefore, if one has the lawful right to drive animals so trespassing from his premises, it follows, necessarily, that in order to constitute the offense of common nuisance the cattle so turned out upon the public highway and permitted to go abroad must have belonged to or have been under the control of the person turning them out.

Inasmuch as the ownership or control of the cattle so turned out and permitted to go upon the public highway is an essential ingredient of and necessary to be alleged in the indictment, information or complaint charging the offense of common nuisance in a case like the one at bar, and to be proven by the prosecution as alleged, it is obvious that the lack of such ownership or control is not, as the prosecution seems to contend, a mere matter of defense to be shown by the defendant on the trial. It is proper to observe that the defendant during the progress of the trial in the lower court duly objected to all evidence offered by the prosecution tending to show ownership of the cattle in himself, on the ground that such fact was not alleged. His objections, however, were overruled.

The exception as to the overruling of the demurrer, for the reasons stated, is sustained. The verdict and judgment are set aside and the defendant is granted a new trial.

E. W. Sutton, Deputy Attorney General, for the Territory.

C. W. Ashford for defendant.

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A. V. GEAR v. WILLIAM HENRY.

MOTION TO DISMISS APPEAL.

ARGUED MARCH 4, 1912.

DECIDED MARCH 6, 1912.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

APPEAL AND ERROR—*order denying motion to quash summons not appealable.*

An order of a district magistrate denying a motion to quash a summons is not a final order, or one which in effect determines the action, and, therefore, it is not appealable.

OPINION OF THE COURT BY DE BOLT, J.

This is an appeal by the defendant on points of law from an order of the district magistrate of Honolulu denying a motion, made by the defendant upon special appearance, to quash the summons issued in the above entitled cause then pending before the district magistrate. The plaintiff moves to dismiss the appeal on the ground that the statute does not allow an appeal from such order, it not being final.

Under the provisions of section 1858, R. L., as amended by Act 23, Laws of 1909, "Appeals shall be allowed from all decisions of district magistrates in all matters, whether civil or criminal, to the circuit court of the same circuit," upon the facts; "provided, that any appeal solely upon points of law from a decision of a district magistrate shall be so stated in the notice of appeal, and such appeal upon points of law may be made either to the circuit court of the same circuit or to the supreme court." In either case, whether the appeal is upon the facts or upon points of law, the "decision" appealed from must have been final. Such has been the uniform holding of this court. *Prov. Gov't. v. Ah Un*, 9 Haw. 164; *Prov. Gov't. v. Smith*, Id. 179; *Brown v. Carvalho*, Id. 180; *Prov. Gov't. v. Hering*, Id. 181, 187; *Prov. Gov't. v. Aloiau*, Id. 399, 401; *Lyman v. Winter*, 15 Haw. 424, 426; *Correa v. Baldwin*, 16 Haw. 782.

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"It is a well-settled principle of law that an appeal will not lie, in the absence of a statute permitting it, from an interlocutory order, judgment, or decree. There must be a final order, judgment, or decree rendered in the cause to permit a review. Interlocutory orders are reviewable, in the absence of a permissive statute, only on appeal from the final judgment that is rendered in the cause." 2 Cyc. 586.

"A judgment, order, or decree, to be appealable, must determine the controversy, or the rights of the parties, and leave nothing further to be done. Accordingly, a judgment or order of court, though determining the law applicable to the issues of an action, yet leaving questions of fact unsettled, is not a final judgment." 2 Id. 587.

Was the order of the district magistrate denying the motion to quash the summons final? We think not. It was merely interlocutory. It did not determine the controversy between the parties. There remained questions of fact unsettled. The rule seems to be universal that an order overruling a motion to quash a summons or to set aside service of the summons is not final, but interlocutory, and therefore is not appealable. "An order overruling a motion to quash a writ or summons is a mere interlocutory order from which an appeal will not lie." 2 Cyc. 609; *Guilford County v. Georgia Co.*, 109 N. C. 312; *Powell v. Nolan*, 32 Wash. 403; *Prussian N. Ins. Co. v. Northwest F. & M. Ins. Co.*, 19 Wash. 281; *Latimer v. Central Elect. Co.*, 101 Wis. 310.

If the defendant was not duly served with process he could have disregarded the entire proceedings, or he could have appeared, as he did, and upon his motion to quash being denied, he could then have continued in the case until final judgment, from which he could then have appealed on such points of law as the case might present, and his continuance in the case would not have operated as a waiver of the point of law made as to the ruling of the magistrate on his motion to quash. 3 Cyc. 525, 526; 2 Ency. Pl. & Pr. 629, 630; *Harkness v. Hyde*, 98 U. S. 476, 479; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 206.

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The motion to dismiss the appeal is granted. The appeal is dismissed.

C. F. Peterson for the motion.

W. B. Lymer contra.

TERRITORY OF HAWAII v. ALBERT A. ARAUJO.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

ARGUED FEBRUARY 26, 1912.

DECIDED MARCH 7, 1912.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

HEALTH—Boards of—power to make regulations.

Boards of health have no implied or inherent power to make regulations having the force of law.

SAME—statutory power, grant of.

Powers conferred upon boards of health to enable them to effectually perform their functions in safeguarding the public health should receive a liberal construction, but a regulation is void which goes beyond the limits of the power conferred by the legislature.

SAME—regulation of board of health against having, keeping or maintaining banana trees.

Section 6 of a regulation made by the territorial board of health on November 9, 1911, making it unlawful to have, keep, maintain or permit, within certain areas, any banana tree, or any other tree or plant capable of holding water in which mosquito larvae are liable to breed, held to be not authorized by section 991 of the Revised Laws, as amended by Act 132 of the Session Laws of 1911, providing that the board of health may make such regulations respecting water in which mosquito larvae breed as it shall deem necessary for the public health and safety.

OPINION OF THE COURT BY ROBERTSON, C.J.

This case comes to this court upon a writ of error to the circuit court of the first judicial circuit issued upon the petition of the Territory under the provisions of Act 40 of the Session Laws of 1911.

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The charge entered against the defendant in the court below was that at Honolulu, Territory of Hawaii, and within one hundred and fifty feet of a dwelling house, within five miles of the harbor of Honolulu, on the first day of February, 1912, he did, unlawfully and wilfully, have, keep and maintain banana trees contrary to the provisions of a certain regulation of the board of health of the Territory of Hawaii, duly passed by the board and approved by the governor on the ninth day of November, 1911, and published on the day following. The regulation, which contained several sections, was set out in full in the charge.

The defendant interposed a demurrer which questioned the sufficiency of the charge and the validity of the regulation upon several grounds. The circuit court sustained the demurrer on the ground that the sixth section of the regulation, being the section which the defendant was accused of having violated, was beyond the power of the board of health to pass. The ruling was based on the construction of the statute under which the board purported to act in making the regulation in question, and, hence, the statute upon which the charge was founded within the meaning of section 1 of said Act 40.

Sections 988 and 991 of the Revised Laws, as amended by Act 132 of the Session Laws of 1911, relating to the board of health, include the following provisions:

"The board shall have the general charge, oversight and care of the health and lives of the people of the Territory. It shall have authority in matters of quarantine and other health matters and may declare and enforce quarantine when none exists and modify and release quarantine when it is established."

"The board of health, with the approval of the governor, may make such regulations respecting nuisances, foul or noxious odors, gases or vapors, *water in which mosquito larvae breed*, sources of filth, causes of sickness or disease, within the respective districts of the Territory * * * as it shall deem necessary for the public health and safety."

Section 992 requires that all such regulations shall be published, and section 993 provides a penalty by fine not exceed-

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ing one hundred dollars for the violation of any such regulation.

The regulation which it is alleged the defendant violated included the following provisions: "Section 1. These rules and regulations shall apply to the following described areas in the District of Honolulu, Island of Oahu, Territory of Hawaii, namely (a) the entire area within one mile of the harbor of Honolulu, and (b) all areas within 150 feet of any building within five miles of the harbor of Honolulu." "Section 6. It shall be unlawful to have, keep, maintain or permit on any such area any banana tree, or any other tree or plant *capable of holding water in which mosquito larvae are liable to breed.*"

In affirming the ruling of the court below, we deem it sufficient to state briefly our reasons for holding that the prohibition of the last quoted section of the regulation is in excess of the power granted by the statute to the board of health, and that that section of the regulation is, therefore, invalid.

In *McCandless v. Campbell*, 20 Haw. 411, 417, we said that there is an exception to the doctrine of constitutional law that the power conferred upon the legislature to make laws cannot be delegated to any other body or authority in "that the power to enact regulations concerning the public health may be delegated to municipal corporations or local boards of health. Though this latter has been held not to be a delegation of legislative power, but merely the providing of an agency for carrying out the legislative enactment," also that, "It has long been the practice in this country to invest boards of health with what seem to be legislative powers relating to matters affecting the public health, and, in this connection, to authorize the promulgation of rules and regulations which have for their object the protection of the public health and the prevention of disease. The validity of such legislation has been repeatedly affirmed."

But boards of health have no implied or inherent power to make regulations having the obligatory force of law, and every such regulation, to be valid, must be shown to rest upon statu-

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tory authority. In this case it is not questioned, and we therefore assume, that the statute authorizing the board of health to make regulations respecting water in which mosquito larvae breed amounts to a grant of power to prohibit the having on one's premises of water in which mosquito larvae breed. The sixth section of the regulation, however, according to the construction to be given to it, contains a prohibition against having within a certain area either "any banana tree" or "any banana tree capable of holding water in which mosquito larvae are liable to breed." In either case, it is clear, the regulation would be much wider in its scope than the statute. There is no such natural or necessary connection between "banana trees" and "water in which mosquito larvae breed" as would justify, under even a most liberal construction, a holding that statutory authority to make regulations respecting the latter would authorize a prohibition against the former. Authority to prohibit the having of water in which mosquito larvae breed is not authority to prohibit the having of a tree which is merely capable of holding water in which such larvae are liable to breed. It would be doing violence to the language used by the legislature to hold that the authority to make regulations respecting water in which mosquito larvae breed was intended to authorize the condemnation of all banana trees within certain areas irrespective of whether they contain water in which, according to the course of nature, mosquitoes will breed. The charge that the defendant did "have, keep and maintain banana trees" seems to have been made on the theory that the regulation contained an absolute prohibition against having such trees within the areas mentioned. Counsel for the Territory, in their brief, say, "It must of course be admitted that all banana plants do not always contain water," also that, "It is only when the water is retained and kept more or less quiet that the mosquito is enabled to lay eggs with any degree of certainty that the eggs will hatch, larvae form, and eventually an adult mosquito be formed," and it would appear from the language of the regu-

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lation that the most the board of health could find as a basis upon which to rest its prohibition against the maintenance of banana trees was that they are capable of holding water in which mosquito larvae are liable to breed. But counsel assert it to be a fact that banana trees habitually do hold water in which mosquito larvae breed, and ask the court to take judicial notice of the fact. We may well take notice of the fact that banana trees are capable of holding water, but it is not an accepted fact that they naturally and commonly hold water for the length of time and under the circumstances required to breed mosquito larvae. It is urged that if the court will not take judicial notice of the fact as requested the prosecution should be given an opportunity to make proof of it. But before a charge can be entered under which proofs may be adduced there must be a valid regulation.

It has very properly been held that powers conferred upon boards of health to enable them to effectually perform their important functions in safeguarding the public health should receive a liberal construction. *Gregory v. New York*, 40 N. Y. 273, 279; *State v. Zimmerman*, 86 Minn. 353, 357; *La Porta v. Board of Health*, 71 N. J. L. 88; *Whidden v. Cheever*, 69 N. H. 142. But a regulation is void which goes beyond the limits of the power conferred upon the board by the legislature. *Hurst v. Warner*, 102 Mich. 238; *State v. Burdge* 95 Wis. 390, 399; *Com. v. Drew* (Mass.), 94 N. E. 682; *Trabue v. Todd County* (Ky.), 102 S. W. 309; *Village of Flushing v. Carraher*, 33 N. Y. S. 951; *Blue v. Beach*, 155 Ind. 121, 131. "Every person affected by the rules and regulations of such a board or tribunal is required to govern himself in accordance with such rules and regulations *if within the scope of the authority granted by the legislature* and adopted and published as required by law." *Pierce v. Doolittle*, 130 Ia. 333, 336.

The case of *Hurst v. Warner* affords a very good illustration. A statute of the State of Michigan authorized the state board of health to establish general rules for the detention of railroad

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cars and other conveyances whenever it should be shown that such cars or other conveyances contain any person or property which has been exposed to any dangerous communicable disease, or when it should be shown that any person or property was being transported on such railroad cars or other conveyance from any locality where dangerous disease exists and where under the circumstances shown to the board such persons or property are likely to carry infection of such disease. Purporting to act under the statute, the board of health made rules which recited the existence of communicable diseases in various foreign countries from which immigrants were coming to the United States in large numbers, one of which provided that, with certain exceptions, all baggage of all immigrants destined to pass into or through Michigan should be detained until disinfected. The court said, "Under those rules the baggage of all immigrants was subject to disinfection whether such immigrant came from a port or locality where any dangerous communicable disease existed or not. Indeed, there is no allegation in the complaint that the baggage in question came from such locality. This is beyond the power of the board. * * *

The rule in question did not make it a prerequisite to the inspection that the baggage being transported came from a locality where such disease existed, as ascertained by the board or inspector, and in this respect was broader than the statute, and cannot be sustained." 102 Mich. 242, 247.

The case of *Green v. Savannah*, 6 Ga. 1, cited by the plaintiff-in-error, is not inconsistent with the cases above referred to. In that case, it appears, a statute authorized the mayor and aldermen of the city of Savannah to pass ordinances prohibiting the cultivation of rice within certain limits. An amendatory act authorized the mayor and aldermen to pass ordinances for the purpose of carrying into effect "the plan and system for reducing to and keeping in a state of dry culture, the low or swamp lands situate around and lying about the city of Savannah." An ordinance was passed prohibiting the

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cultivation of rice within certain limits. The principal question discussed there was whether the statutes were constitutional, and as the court held them to be valid it followed as a matter of course that the ordinance, which was clearly within the statute, was also valid.

The ruling of the circuit court sustaining the demurrer to the charge is affirmed.

E. W. Sutton, Deputy Attorney General (Alexander Lindsay, Jr., Attorney General, with him on the brief), for plaintiff-in-error.

F. Schnack (E. C. Peters with him on the brief) for defendant-in-error.

THE FIDELITY INSURANCE COMPANY, LIMITED,
v. WILLIAM HENRY.

APPEAL FROM DISTRICT MAGISTRATE OF HONOLULU.

ARGUED MARCH 13, 1912.

DECIDED MARCH 16, 1912.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

CORPORATIONS—*appointment of officer, proof of.*

The appointment of an officer of a corporation may be proved by the testimony of the officer himself.

SAME—*proof of authority to institute action in corporate name.*

In an action by a corporation before a district magistrate it is not incumbent upon the plaintiff to prove affirmatively that the institution of the action was authorized by the corporation, and a failure so to do is not ground for non-suit.

OPINION OF THE COURT BY ROBERTSON, C.J.

An action of replevin, entitled as above, was instituted in the district court of Honolulu. When the case came on for trial the defendant challenged the authority of counsel for plaintiff to appear as such counsel. Counsel stated to the court that he had authority to appear for the plaintiff and that he would prove it

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by the testimony of one A. V. Gear. Mr. Gear was sworn as a witness and testified to being the president of the Fidelity Insurance Company, Limited, and that he had brought the action for the restitution of the property in dispute. He also testified that the plaintiff company owns the articles in question; that they were taken by the defendant and are now in his possession, and that he had been requested to return them. Counsel for the defendant cross-examined the witness; renewed his former objection; and orally interposed a plea in abatement, "no showing of corporate authority to bring suit." The objection and plea were overruled. Counsel concluded his cross-examination of the witness, and, apparently, the plaintiff then rested. The defendant moved for a non-suit which was denied; the defendant testified; and at the conclusion of the testimony the court gave judgment in favor of the plaintiff. The defendant appealed on points of law which are certified to this court as follows: (1) When in a suit purporting to be brought by a corporation the defendant pleads in abatement an absence of authority from said corporation to institute said suit, it is incumbent upon the plaintiff to affirmatively prove due corporate authority to bring the suit. (2) In the same suit, the same plea in abatement having been overruled and the plaintiff having rested without affirmatively proving corporate authority to bring said suit, a motion for non-suit based upon the above grounds must be granted. In this court counsel for the defendant relied solely on the second point, his contention, briefly stated, being, that there was no competent evidence that Mr. Gear was or is the president of the company; that the president of a corporation has no authority by virtue of his office to institute suits in the name of the corporation; that there was no showing made that Mr. Gear had authority to bring this action for and on behalf of the Fidelity Insurance Company, Limited; and that it was incumbent upon the plaintiff, as part of its case, to show that the bringing of the action was authorized by the corporation.

That Mr. Gear is the president of the corporation was suffi-

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ciently shown, *prima facie*, by his own testimony. The defendant did not contradict that testimony by any evidence. The appointment of an officer of a corporation may be proved by parol evidence.

But counsel argues that, assuming that Mr. Gear was shown to be the president of the company, it does not follow that he was authorized to institute the action, and he cites *Waikapu Sugar Co. v. Haw. Coml. Co.*, 8 Haw. 343. In that case it was held that the president of a corporation is not authorized *virtute officii* to bring suits in the name of the corporation. Possibly that rule should not be held to apply under all circumstances. See *Trustees of Smith Charities v. Connolly*, 157 Mass. 272; *Colman v. West Virginia Oil Co.*, 25 W. Va. 148. However, no reason has been advanced to show that it does not apply here. But in the *Waikapu Sugar Co.* case the point was raised by a plea in abatement supported by affidavit. In the case at bar no evidence was offered by the defendant in support of his plea, and the question is whether the failure of the plaintiff to show affirmatively that the action was expressly authorized by the corporation is a ground for non-suit.

In *Hawaii Mill Co. v. Andrade*, 14 Haw. 500, it was held that in a complaint before a district magistrate in an action by a corporation it is unnecessary to allege that the plaintiff is a corporation. It was there said that, "There does not seem to be any more reason for requiring a corporation, an artificial person, to allege its capacity to sue by affirmative averments than there is for a natural person. The presumption of capacity indulged in favor of the latter ought to be extended to the former at least until the same is brought in question by proper plea." Nor is there any more reason for holding that it should be alleged in a complaint in an action brought by a corporation that the institution of the action was authorized by the corporation than there is for requiring an allegation that the plaintiff is a corporation. If it is not necessary to allege the fact, it would seem to necessarily follow that a plaintiff is not required to make proof of it,

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and that the corporation is not to be non-suited for failure so to do.

The defendant's plea in abatement was properly overruled because it was not supported by proof, and his motion for a non-suit was properly denied because it was not incumbent upon the plaintiff to show affirmatively that its president was authorized to cause the action to be brought.

Judgment affirmed.

C. F. Peterson for plaintiff.

W. B. Lymer (*Thompson, Wilder, Watson & Lymer* on the brief) for defendant.

CONCURRING OPINION OF PERRY, J.

It seems to me to be unnecessary to consider to any extent the correctness of the ruling in *Waikapu Sugar Co. v. Hawaiian Commercial & Sugar Co.*, 8 Haw. 343, 351, that "the president of a corporation cannot by virtue of his office and without authority from the corporation begin suit in the name of the corporation," or to suggest any possible limitations to its applicability. With reference to that decision it is sufficient to say that in that case the point was raised by a plea in abatement supported by affidavit while in the case at bar no evidence was offered by the defendant in support of his plea.

In the conclusion that the judgment should be affirmed I concur on the sole ground that the plea was not supported by proof and that the motion for non-suit could not prevail since it was not incumbent on the plaintiff to allege in the declaration or to show affirmatively that the institution of the action was authorized by the corporation,—irrespective of whether in such a case as this or in any case the president is authorized *virtute officii* to bring suit in the name of the corporation.

Territory v. Chung Nung, 21 Haw. 66.

TERRITORY OF HAWAII v. CHUNG NUNG

RESERVED QUESTION FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED MARCH 18, 1912

DECIDED MARCH 26, 1912

ROBERTSON, C. J., PERRY AND DE BOLT, JJ.

JURY—jurors excused prior to service of summons.

The excusing of jurors prior to service of summons and of the court's own motion, if not contemplated by the statute, is, at most, a mere irregularity of which a defendant under indictment has no reason to complain, if the grand jury finding the indictment and as finally constituted is composed wholly of qualified jurors, and if the defendant is not injured by the proceedings.

OPINION OF THE COURT BY DE BOLT, J.

To an indictment against the defendant, found by the grand jury of the circuit court of the first circuit on February 7, 1912, the defendant filed a plea in abatement, alleging, in substance, that the members of the grand jury were not legally qualified to serve, in that, on the date fixed pursuant to law for drawing the names of twenty-three persons to serve as grand jurors during the 1912 term of the circuit court of the first circuit, and upon the names of twenty-three persons being so drawn, the circuit judge, then presiding, of his own motion, summarily excused from service, without causing them to be summoned, four of those so drawn, upon the ground that they were "serving on the jury of the United States District Court," four, upon the ground that their names "had not been released from the envelop" containing the names of those who had served at the preceding term; one, upon the ground that he was "living in the outside district where it would be impossible for him to attend;" one, upon the ground that he was "in the Philippines;" two, upon the grounds that "one is a bookkeeper at Aiea and the other is manager of the Pearl City Fruit Co., and it will be impossible for them to attend without great expense

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to the county, * * * living too far away from the center of activity;" that the circuit judge thereupon caused a sufficient number of names of other persons to be drawn from the grand jury box to complete the panel of twenty-three, and a summons was issued accordingly; that the grand jury, as thus constituted, found and returned the indictment in question; that the clerk, not only drew the names of twenty-three persons to serve as grand jurors, but that he drew the names of thirty-five persons to serve as grand jurors; that "this is the first opportunity which" the defendant "has had to raise" these "objections and challenge to the grand jury, * * * in that he was arrested and confined in the county prison * * * subsequent to the impaneling of the grand jury * * * and was not present when the persons constituting said grand jury * * * were, or any, or either, of them were sworn or examined upon their voir dire, or when the said grand jury * * * was impaneled and sworn." The prayer is that the indictment be quashed and dismissed.

The Territory interposed a demurrer to the plea in abatement upon the ground that it "does not state facts sufficient to warrant the quashal or dismissal of the indictment." The circuit judge now presiding at the trial of criminal cases has reserved for the consideration of this court the question as to whether the demurrer shall be sustained or not.

The plea in abatement does not allege, nor does it in any way appear, that the action of the circuit judge in the drawing and impaneling of the grand jury was based upon any improper motive. Neither is it alleged, nor does it appear, that any member of the grand jury was disqualified or incompetent to serve. No injury or prejudice to the defendant is pointed out. Counsel for the defendant in his oral argument frankly admitted that he did not question the good faith of the circuit judge, nor the qualification of any member of the grand jury. But he contends, however, that the circuit judge in excusing the persons from service whose names were drawn

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as above stated and the drawing of the names of others to complete the panel, acted beyond the scope of his legal powers, and that such action on his part was, in effect, a selection of the grand jury by the judge, and not a selection by lot; consequently there was no grand jury.

The contention of the Territory is, that the plea in abatement does not show any irregularity in the drawing and impaneling of the grand jury, and that even did any irregularity exist the matter not being one touching the qualification or competency of the persons drawn and impaneled to act as a grand jury, and the action of the circuit judge not being fraudulent or tainted with fraud, and there being no intent to prejudice the defendant, and no prejudice to him in fact resulting, the irregularity, if such exists, cannot be taken advantage of by him, especially after the complete organization of the grand jury. We do not deem it necessary to express an opinion as to whether or not the defendant had the right to raise the question now before us by plea in abatement. We will assume however, for the purposes of this case, that the questions presented are properly before us. This brings us to the consideration of the sufficiency of the plea itself, which involves the questions as to the action, as well as the power, of the circuit judge in summarily excusing from jury service the persons whose names had been drawn from the grand jury box and the drawing of others to complete the panel.

The circuit courts are necessarily vested with considerable discretion in the matter of excusing persons from jury service. The exercise of this discretion is ordinarily invoked by the juror himself after he has been duly summoned to serve; but the excusing of jurors prior to service of summons and of the court's own motion, if not contemplated by the provisions of the statute (R. L. §§1773, 1774), is, at most, a mere irregularity of which a defendant under indictment has no reason to complain, if the grand jury finding the indictment and as finally constituted is composed wholly of qualified persons,

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and if the defendant is not injured by the proceedings. R. L. §1795; *Territory v. Johnson*, 16 Haw. 743, 748; *Matsumura v. County of Hawaii*, 19 Haw. 496, 497. We disapprove, however, of the course pursued by the circuit judge in summarily excusing from jury service the persons whose names were drawn and for whom no summons had been issued and served. While statutory provisions relative to the manner of drawing, serving, excusing and impaneling of jurors are generally held to be directory only, still, it is always advisable to adhere to their requirements, and not unnecessarily incur the risk of error or prejudice to interested parties. *State v. Watson*, 104 N. C. 735; *State v. Champeau*, 52 Vt. 316. We cannot say in this case that the action of the circuit judge was such as to render the organization of the grand jury illegal, or such as to vitiate the indictment. We are also of the opinion that the names of the persons who constituted the grand jury were drawn by lot; that the grand jury was legally constituted; and that the indictment against the defendant is valid. The demurrer to the plea in abatement should be sustained. The question reserved, therefore, is answered in the affirmative.

F. W. Milverton, First Deputy City and County Attorney of Honolulu, for the Territory.

Lorin Andrews for defendant.

CONCURRING OPINION OF ROBERTSON, C.J.

The irregularity complained of is not such as to warrant the quashing of the indictment. The procedure prescribed by the statute should, however, be followed by the circuit judges. Section 1774 of the Revised Laws provides that if a person entitled to be excused from jury duty has been summoned as a juror he may make and transmit his affidavit setting forth his reason for claiming an excuse, and that the same shall be considered by the judge "when the name of such person is called." If the affidavit is deemed sufficient in substance it shall be received as an excuse for non-attendance in person and

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the court will order it to be filed by the clerk. And section 1784 provides that, "at the time when the order for the grand jurors is returnable, or as soon thereafter as convenient, the clerk, under the direction of the court, shall call the names of those summoned, and the court may then hear excuses of jurors summoned."

A trial judge ought not to substitute a procedure of his own for that prescribed by the legislature. Should a practice so to do grow up it would be apt to cause the legislature to go to the extreme of making the statutory provisions mandatory as was done in Oklahoma. See *Sharp v. United States*, 138 Fed. 878. Perhaps the circuit judges should be authorized to set aside the names of jurors for such reasons as appealed to the judge in the case at bar at the time of the drawing, but the procedure should be prescribed by the legislature and not inaugurated by the courts.

YOUNG CHUN, DOING BUSINESS AS YE LIBERTY
THEATRE, v. BLONDIE ROBINSON.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT

ARGUED MARCH 27, 1912

DECIDED MARCH 30, 1912

ROBERTSON, C. J., PERRY AND DE BOLT, JJ.

PRINCIPAL AND AGENT—*written contract in name of agent—pleading.*

In a suit by a principal upon an agreement in writing which appears on its face to be the contract of the agent only, the contract should be declared on as made by the principal through the agent.

INJUNCTION—*principles governing issuance—prima facie case.*

To authorize a temporary injunction, a prima facie showing in the bill of a right to the final relief is essential.

OPINION OF THE COURT BY PERRY, J.

This is an appeal from an order of a court of equity refusing to dissolve a temporary injunction restraining the respondent

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from performing as comedian in any theater in the City and County of Honolulu other than "Ye Liberty Theatre." The allegations of the bill are in brief that the complainant, Young Chun, "doing business as Ye Liberty Theatre" in Honolulu, is the owner of a certain amusement and playhouse known as "Ye Liberty Theatre"; that ever since February 22, 1912, complainant has been and is now operating the theater named; that prior to the completion of the theater and in anticipation of its opening complainant "engaged certain performers and artists for different periods of time to do their act or specialty in connection with performances to be given at said Ye Liberty Theatre," advertising that in addition to moving pictures there would be at each performance at least three specialty acts consisting of entertainment by artists specially qualified to perform some unique or special act for the entertainment of the public; that in pursuance of the advertisements "complainant engaged under contract certain special artists as aforesaid including the respondent"; that respondent "is a comedian capable of performing a special, unique and extraordinary act and having special, unique and extraordinary qualities for the performance of said act and for the entertainment of the public"; that relying upon these "extraordinary personal and peculiar qualifications" of the respondent the complainant "did on or about the 14th day of February A. D. 1912 enter into a contract with said respondent a copy of which is hereto attached marked Exhibit A and made a part hereof"; that complainant has "performed all things required of him in and by said contract, Exhibit A," and that the contract is now in full force and effect; that the respondent arrived in Honolulu on March 11, 1912; that immediately upon his arrival complainant requested of him performance of his undertaking; that respondent declined to appear at Ye Liberty Theatre as by the contract required and announced his intention to perform "said special, unique and extraordinary act so contracted to be performed at Ye Liberty Theatre aforesaid" at the Bijou theater

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in Honolulu operated and controlled by The Honolulu Amusement Company, Limited; that on March 11, 1912, respondent did perform at the Bijou theater said "special, unique and extraordinary act" and intends to continue the performance at the last named theater "for the period of three weeks and over"; and that in consequence of respondent's failure to perform at Ye Liberty Theatre complainant has suffered irreparable damage in that "he is unable to procure a reasonable and suitable substitute for the special, unique and extraordinary act contracted for by said respondent."

The contract referred to as exhibit A secures the services of the respondent as comedian "for a period of three or more weeks commencing on arrival" at Honolulu at "Ye Liberty Theatre" and contains a clause prohibiting the respondent from presenting his act or specialty in any other theater in Honolulu within a designated period of time.

The motion to dissolve should have been granted. The allegations of the bill do not show a right on the part of the present complainant, Young Chun, to obtain an injunction. The complainant does, indeed, allege in the bill that he has "engaged under contract" the respondent, but he attaches a copy of the contract, the only one upon which he relies. That contract recites that it was "made and entered into * * * by and between Mr. McGreer Ye Liberty Theatre of Honolulu, T. H., hereinafter designated by the term Manager and Blondy Robinson Vaudeville Artiste hereinafter designated by the term Artiste" and witnesses that "in consideration of the mutual promises and covenants herein contained and the further consideration of \$1 each to the other in hand paid the receipt whereof is hereby acknowledged it is agreed by and between said Manager and said Artiste as follows." Then follows a statement of the terms of the contract, some of which are to be performed by the "said Manager", and the others by "said Artiste". The "said artiste", amongst other things, "agree to be engaged and employed by said Manager." No other party

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is named or indirectly referred to in the agreement. Upon its face it is the contract of "Mr. McGreer," acting for himself and not as agent for another. It is signed by the defendant and by "Mr. McGreer Mgr.," these words being followed in the next line by the words "Bert Levey Circuit."

In support of the bill and of the injunction plaintiff's counsel invokes the principle that ordinarily a principal, whether known or undisclosed, is entitled to the benefits of a contract entered into by his agent and may sue for its enforcement and the further principle that a third party, for whose benefit a contract is entered into by others, may likewise in his own name sue the promisor on the contract. Assuming the law upon these points to be as claimed, it nevertheless remains true that the bill must at least show that the person claimed to have acted as agent did act in that capacity and that the contract was the contract of the principal, or, as the case may be, that the contract was entered into for the benefit of the third party. With reference to these facts the present bill is silent. The allegations as made do not justify the inference that McGreer in entering into the contract in question did so as the agent of Young Chun or that the undertaking of the respondent was intended by the parties to the contract to be for the benefit of Young Chun. It is an elementary rule of pleading that essential facts must be pleaded with clearness and certainty. "Where the contract is in writing and appears on its face to be the personal contract of the agent only, it must be declared on as made by the principal through the agent." 16 Ency. Pl. & Pr. 901; *Pennsylvania Mutual Life Ins. Co. v. Conoughy*, 54 Neb. 123; *Buffalo Catholic Institute v. Bitter*, 87 N. Y. 250; *Harris v. R. R. Co.* 31 S. C. 88 (9 S. E. 690). "To authorize a temporary injunction the complainant must make out at least a prima facie showing of a right to the final relief." 22 Cyc. 754, 755.

It is unnecessary to consider whether the general rules above referred to concerning the right of action by principals, whether

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known or unknown, or by third parties intended to be benefited by those entering into the contract, apply as against an actor of special, unique and extraordinary ability who has contracted to render his services to a named employer or whether such a case falls within the rule that one has the right to elect with whom he will deal.

Other grounds were named in the motion to dissolve but these likewise need not be determined. For the purposes of this case it is sufficient that upon the pleadings the injunction cannot stand.

The order appealed from is reversed, the injunction dissolved and the cause remanded for such further proceedings as may be appropriate.

W. B. Lymer (*Thompson, Wilder, Watson & Lymer* on the brief) for plaintiff.

J. A. Magoon and *N. W. Aluli* for defendant.

ANNIE GARVIE EVANS *v.* BISHOP TRUST CO.,
LIMITED.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT

ARGUED APRIL 1, 1912

DECIDED APRIL 8, 1912

ROBERTSON, C. J., PERRY AND DE BOLT, JJ.

TRUSTS—*construction of trust in favor of heirs and legal representatives.*

Where in contemplation of remarriage, property was conveyed by A. G., a widow, to a trustee to hold and manage the estate, pay the net income to the grantor until her son J. shall attain the age of twenty-one years, if the grantor shall live so long, and upon J. attaining the age of twenty-one, to convey, transfer and deliver to J. one-half of the property, and to hold the other one-half thereof in trust for the grantor absolutely; that in the event of the death of J. before the death of A. G. and before attaining the age of twenty-one, to hold all said property in trust for A. G. abso-

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lutely; and in the event of the death of the grantor before said J. shall have attained the age of twenty-one, the trustee, upon the death of the grantor to convey, transfer and deliver one-half of the property to the heirs and legal representatives of the grantor and to hold the remaining one-half in trust for said J. absolutely, the apparent intention of the grantor being to preserve the corpus of the estate for the benefit of her son J. and such other children as may be born to her, in case she should die before J. attains the age of twenty-one, the words "heirs and legal representatives" are to be construed as words of purchase and description.

SAME—revocability of—absence of clause of revocation.

A trust of this character cannot be revoked by the settlor as against remainder-men in the absence of mistake or fraud. The omission of a clause of revocation without other circumstances than the mere mistaken belief on the part of the settlor that she possessed the power of revocation does not give rise to any inference which could be taken as a ground for the revocation of the trust.

REMAINDERS—destruction of contingent, through merger of estates.

The common law doctrine as to the defeating of contingent remainders through the merger of estates has never been recognized in Hawaii.

OPINION OF THE COURT BY ROBERTSON, C. J.

In this case the respondent obtained the allowance of an interlocutory appeal from an order made by the court below overruling a demurrer to complainant's petition. The petition shows that on the 8th day of January, 1909, the complainant conveyed, assigned, transferred and delivered certain real and personal property to the respondent, its successors and assigns, upon the following trusts: To hold and manage the property, collect the income thereof, and pay the net income to the complainant until James Garvie, the son of the complainant and Alexander Garvie, deceased, shall attain the age of twenty-one years, if the complainant shall live so long; and upon James Garvie attaining the age of twenty-one years, to convey, transfer and deliver to said James Garvie one-half of the property, and to hold the remaining one-half in trust for the complainant, absolutely; but in the event of the death of said James Garvie before the death of the complainant and before attaining the

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age of twenty-one years, to hold all the property in trust for the complainant, absolutely; and in the event of the death of the complainant before the said James Garvie shall have attained the age of twenty-one years, the trustee, upon the death of the complainant, shall convey, transfer and deliver one-half of the property unto "the heirs and legal representatives" of the complainant, and hold the remaining one-half in trust for the said James Garvie, absolutely. The deed recited that a marriage was intended shortly to be solemnized between the complainant and one George H. Evans, who joined in the deed in token of his consent to and approval of the settlement therein made, and the petition contains an averment that the parties have intermarried. The petition also sets forth that the deed "reserved to your complainant no specific power to revoke the trusts created thereunder, although your complainant supposed and believed that said trusts, so created as aforesaid, might at any time be revoked by her, either in whole or in part; and in that mistaken belief, your complainant executed said trust instrument;" that, on the 9th day of January, 1912, the complainant, being desirous of terminating and revoking said trusts as to an undivided one-half interest of the subject matter thereof, and in so far as said trusts should affect all property held in trust solely for complainant, and in order to reinvest title in complainant of said one-half of said trust estate, made demand upon the respondent for a reconveyance of said undivided one-half interest in and to said property; and that the respondent has refused to comply with said demand. Complainant prayed for a decree terminating said trust as to one-half of the property conveyed by the deed, and for the transfer, surrender and delivery thereof to the complainant by the respondent.

The contentions of counsel for the complainant may be summed up as follows: That the maximum interest possible in James Garvie in the property held in trust by the respondent is no more than one-half, since, if he should live to attain the

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age of twenty-one, his mother also surviving, or if his mother should die before he shall have attained that age, leaving him surviving, he would be entitled to only one-half of the trust estate, because, under the second alternative, the remaining one-half would go to the statutory heirs and legal representatives of the settlor; that one-half of the property was put in trust solely for the settlor's benefit; that as the heirs of the settlor could not take as remainder-men there are no "possible beneficiaries not yet in being" to be reckoned with, and the reversion is vested in the complainant; that the course of descent not being interrupted, the heirs and legal representatives of the settlor would take, not under the deed, but under the statute of descents; that, if the limitation to the heirs and legal representatives is to be regarded as an equitable remainder, it is a contingent one, the equitable fee remains vested in the settlor, and the complainant having both the reversion and the intermediate estate the latter is merged in the former and the complainant is to be regarded, in equity, as the absolute owner and, therefore, entitled to demand a reconveyance from the trustee; and that a conveyance by the complainant to a third party, or a reconveyance to her by the trustee, would defeat the equitable contingent remainder. Counsel say that what they have referred to as a contingent remainder is, more accurately speaking, a springing use.

Upon the above reasoning, together with the fact that the complainant, when she executed the deed in question, believed that she might at any time revoke the trusts, counsel conclude very earnestly that the complainant is entitled to the relief sought.

The argument rests largely upon the assumption that the "heirs and legal representatives" cannot take as remaindermen; that is to say, that those words cannot be regarded as words of purchase or description. The petition contains no statement of the motive or reason for the creation of the trust by the complainant, so we are left to infer her motive from what appears

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from the deed itself. The natural inference to be drawn from what appears on the face of the deed is that, after securing the net income of the property for herself, the settlor desired to preserve the corpus of the estate for the benefit of her son James, and such other children as may be born to her, in case she should die before James attains the age of twenty-one years. In order to effectuate the intention so disclosed it is necessary that the words "heirs and legal representatives" be construed, not as words of limitation, but of purchase and description. They are frequently so used. *Thurston v. Allen*, 8 Haw. 392; *Ebey v. Adams*, 135 Ill. 80, 90; *Bishop v. Tinsley*, 41 S. E. 895, 898; *Wettach v. Horn*, 201 Pa. St. 201, 206; *Hamilton v. Wentworth*, 58 Me. 101, 105; *Clarke v. Cordis*, 4 Allen 466, 480; *Ewing v. Jones*, 130 Ind. 247.

In *Brown v. Wadsworth*, 168 N. Y. 225, 233, the court said, "In ante-nuptial contracts, with a view to a subsequent settlement, the limitation of real estate to the husband and wife for their lives and the life of the survivor, remainder to the heirs of the bodies of the parents, or to their 'right heirs', made such heirs purchasers, otherwise the provision intended for such heirs might be defeated by the conveyance of their parents or of the trustee, a result which equity would not tolerate."

The claim that the heirs and legal representatives would take, not under the deed, but under the statute of descents; that James Garvie has no interest in the one-half of the estate which is limited to the heirs; and that there are no possible beneficiaries not yet in being to be reckoned with, thus falls to the ground.

Many cases might be cited to show that under such circumstances as are here presented the court, at the instance of the settlor, would not be justified in annulling the trust, and that contingent interests are as much entitled to protection as those which are vested.

In *Watson v. Bonney*, 2 Sandf. 405, 417, a woman, in contemplation of marriage, conveyed her estate to a trustee in fee,

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reserving to herself the income for life, the direction of the investment of the capital by the trustee, the power to dispose of the whole by will, and the restoration of the property to herself if she should survive her husband. The deed provided that in case of the decease of the grantor without making any appointment, the trustee should pay over and transfer the estate to such person or persons as would be her legal representatives by the statute for the distribution of intestates' estates. The case seems to have been affected to some extent by statute, but beyond that the court held that, "The term 'legal representatives' is not used in this instrument in its ordinary sense. It clearly does not mean executors or administrators. It is those legal representatives who are designated by the statute of distributions of intestates' estates." And that "In this construction of the trust deed, the infant children of the plaintiff have a contingent future estate which the court cannot divest."

In *Dickey v. Goldsmith*, 111 N. Y. S. 1025, a married woman conveyed certain property to her husband and two others in trust to pay the net income to her during her lifetime and upon her death to pay over, divide and convey the principal of the trust estate among such persons as the grantor should by her will appoint and in default of such appointment by will to convey the property to the heirs at law and next of kin of the grantor. The grantor had three children living. The court said, "The trust was not terminable at the option of the settlor. Nor is any right to terminate or change it during her lifetime reserved in the settlor in the deed of trust. The only right of control of the principal which is reserved in the deed of trust is the right to dispose of it by will. The children of the settlor have, therefore, a vested interest in this principal, which is subject to being divested by the will of the settlor. The court is without power to divest these infant children of their interest in this future estate."

Counsel for the complainant account for the holding in that case that the children had vested interests in the estate by rea-

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son of a statute of New York which makes certain remainders vested which at the common law would be held to be contingent. But clearly the court there proceeded on the theory that the heirs and next of kin would take as purchasers, and whether the interests given them were vested or contingent would be unimportant.

In *Sands v. Old Colony Trust Co.*, 195 Mass. 575, certain personal property was conveyed by deed to a trustee with power to sell and reinvest, to pay to the settlor the net income and such parts of the principal as in the trustee's discretion would be warranted by circumstances, the fund, after the settlor's death, to be paid to his heirs, or if he left a will, to his executors. The court said (p. 580), "These circumstances are inconsistent with any right on his (settlor's) part to claim the absolute ownership of the fund or the revocation of the trust. Those who shall be at his decease the beneficiaries under his will or his legal heirs will then become entitled to the fund. *Crawford v. Langmaid*, 171 Mass. 309, and cases there cited. Here, as in *White v. Woodberry*, 9 Pick, 136, there is nothing vested in the plaintiff but the right to the income of the property and to such part of the principal sum as the trustee shall see fit to pay to him."

In *Anderson v. Kemper*, 116 Ky. 339, the plaintiff conveyed certain property to his father upon the expressed consideration of the sum of \$9000. It was shown, however, that the real consideration was the giving of a bond conditioned to pay the grantor an annuity and upon his death to pay to his heirs the sum of \$7000. This was held to constitute a trust whereby the plaintiff was to have the beneficial use of the property during his lifetime and his heirs after him. The court proceeded upon the theory that the grantor's heirs would take as purchasers and held the trust to be irrevocable in the absence of the consent of all the beneficiaries.

In *Paul v. Paul*, L. R. 20 Ch. D. 742, by a marriage settlement the wife's property was settled, after life estates in the

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husband and wife and in default of children, in the event of the wife surviving, on her, and in the event of the husband surviving, as the wife should by will appoint, and in default, on her next of kin, excluding the husband. It was held that the trust in favor of the next of kin could not be revoked, and that although there was no possibility of issue, the husband and wife together were not entitled to the corpus of the settled fund.

In *Love v. Love*, 17 Haw. 206, 211, this court said, "It would be immaterial to any question in this case whether the cestui que trustent have a vested or a contingent equitable remainder and we have no occasion to discuss the nature of their estates since the gift over would not fail or the fee revert to the donor or his heirs before the contingency, if there were any, occurred. We do not intimate that a contingent estate is created by the deed; we allude to the matter only in order to point out that the trust would not be imperfect if there were such uncertainty in regard to the persons ultimately to take."

In *Dickey v. Goldsmith*, *Sands v. Old Colony Trust Co.*, and *Paul v. Paul*, in holding the trusts to be irrevocable notwithstanding that the settlors had reserved the power to dispose of the principal estate by will, the courts went farther than we are required to go in this case.

Counsel for the complainant cite 1 Perry on Trusts (4th Ed.) Sec. 104, based on the case of *Nightingale v. Nightingale*, 13 R. I. 113, for the proposition that, "where the trust does not break the natural course of descent of the property, and is not needed for the protection of the life cestui, who is the grantor, equity will, on the application of the cestui, terminate the trust and decree a conveyance."

In the *Nightingale* case, a woman, contemplating marriage, conveyed her estate to a trustee who was to hold and care for the trust property, pay the income to her, make sales at her request, and convey the property to her if she survived her husband; and in case of her death the trustee was to hold to the

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use of her testamentary appointees, and if she died intestate, to the use of her heirs at law. The court remarked that the course of descent was not broken, and went on to say that, "The trust was created in consequence of a promise made by her (the settlor) to her father before his decease. Since said promise was made, to carry out which the deed was executed, the law regarding the law of property of married women has been so far changed that a married woman can at any time have a trustee appointed to manage and hold her property, she can receive the rents of it herself, and can thus have as full control of it as she could under this trust, except that she cannot sell certain sorts of property without her husband joining in the conveyance. We see no good reason why a decree should not be made for a reconveyance, discharged of the trust." (p. 116) Such reasoning has no application to the case at bar, and in so far as the case is to be considered as opposed to the cases above cited it is against the weight of authority. It may be that the decision was affected by the operation of the Rule in *Shelley's* case. See *Angell, Petitioner*, 13 R. I. 630, and *Taylor v. Lindsay*, 14 R. I. 518. If that is so the case would be of no value as authority in a jurisdiction where, as here, that rule is not in force.

It is said that the contention here made found approval in the case of *Kellett v. Sumner*, 15 Haw. 76, 84. But it is clear that it received no special consideration by the court. The contention was advanced by counsel in that case but the court in referring to it pointed out that the limitation contained in the instrument involved there was not to "heirs" but to "nearest blood relatives."

It is further contended by counsel for complainant, on the assumption that the equitable reversion remains vested in the settlor, that her immediate estate is to be regarded as having merged in that reversion with the result that the contingent remainder in the heirs and legal representatives has been des-

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troyed. As to this we deem it enough to say that the common law doctrine as to the defeating of contingent remainders through the merger of estates has never been recognized in this jurisdiction. *Godfrey v. Rowland*, 16 Haw. 377. We perceive no good reason why this trust should not be given full effect according to the apparent intention of the settlor.

The remaining point is as to the effect of the fact that although the settlor believed that the trust might at any time be revoked by her, no clause giving her power so to do was inserted in the deed. This question has received much consideration in former cases in this court. *Afong v. Afong*, 5 Haw. 191; *Kellett v. Sumner*, 15 id. 76; *Love v. Love*, 17 id. 206. The rule established by those cases is that a trust of the character of that now under review cannot be revoked by the settlor as against remaindermen, in the absence of mistake or fraud. The question always must be whether the trust instrument appears to have been executed freely and intelligently with the intention that it should not be revocable. The omission of a clause of revocation is sometimes regarded as a circumstance, which, taken together with other circumstances, tends to show mistake or undue influence. But the absence of such a clause from the deed without circumstances other than the mere mistaken belief on the part of the settlor that she possessed the power of revocation does not give rise to any inference which could be taken as a ground for the revocation of the trust. In this case the intention of the settlor was to make provision for her son and other possible children, and her approaching marriage furnished the motive. We hold, therefore, that the trust is not revocable at the will of the complainant.

The order overruling the demurrer is reversed, and the case is remanded to the circuit judge.

W. B. Lymer (*Thompson, Wilder, Watson & Lymer* on the brief) for complainant.

C. H. Olson (*Holmes, Stanley & Olson* on the brief) for respondent.

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FRED SACKWITZ v. ELIZABETH GOODWIN,
CHARLES F. SACKWITZ AND BISHOP TRUST
COMPANY, LIMITED, A CORPORATION.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED APRIL 8, 1912.

DECIDED APRIL 17, 1912.

ROBERTSON, C. J., PERRY AND DE BOLT, JJ.

EQUITY—purpose of suit—remedy in personam.

A suit in equity, the essential purpose of which is to establish a trust with reference to, as well as to establish a title in, certain land, is purely a proceeding *in personam*, and jurisdiction of the persons of the defendants, non-residents, cannot be acquired by substituted service.

OPINION OF THE COURT BY DE BOLT, J.

This is a bill in equity, the essential purpose of which is to establish a trust with reference to, as well as to establish a title in, certain real property in Honolulu. The facts essential to a consideration of the questions presented are these: That Matilda Bright Sackwitz, the wife of the complainant, died vested with the legal title to the property in controversy, leaving a certain instrument in writing purporting to be her last will and testament whereby she devised the property to the respondents, Elizabeth Goodwin and Charles F. Sackwitz, nominating the respondent, Bishop Trust Company, Limited, executor of the will; that the will has been duly filed for probate, the petition for which is now pending; that the property was acquired by the complainant, and was paid for and improved by him with his own money; that pursuant to an agreement between the complainant and his wife, and with the mutual understanding that the property was his, the deed therefor was executed to Mrs. Sackwitz.

The prayer of the bill is, that the title to the property be declared to have been in the wife of the complainant as trustee

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for him; that the land be decreed to be the property of the complainant; that a commissioner be appointed to execute a deed to the complainant conveying the same to him; that pending the hearing of the cause the respondents be enjoined from dealing with it; and that a receiver be appointed to collect the rents, issues and profits thereof.

Summons was issued, and the officer's return shows that personal service was had upon the respondent, Bishop Trust Company, Limited, and that upon due and diligent search the other respondents, Elizabeth Goodwin and Charles F. Sackwitz, could not be found, they being residents of the State of Ohio, but that he had delivered to a person upon the premises involved in the controversy certified copies of the summons and complaint and at the same time showing him the originals. It is obvious that the service thus attempted was predicated upon section 1840, R. L., which provides, *inter alia*, that when the defendant cannot be found by the officer charged with the duty of serving process, service may be had by leaving a copy of the petition and of the summons "with some one upon the premises involved in the controversy."

The respondents, Elizabeth Goodwin and Charles F. Sackwitz, appeared specially by counsel and moved that the service of summons upon them be quashed on the ground that such service was void, having been made in the manner disclosed by the officer's return. The circuit judge granted the motion, and entered an order quashing the service. The complainant appeals from that order.

Counsel for the respondents contend that this is not a suit *in personam* but is one affecting title and right to land within the local jurisdiction; that the pronouncement by the court that the title to the property was in the wife of the complainant as trustee for him, and that the property is that of the complainant, would be a decree operating *in rem* and not *in personam*;

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that the presence of the respondents is not essential to the power of the court to declare the trust and pronounce the land the property of the complainant. In our opinion the case at bar is one purely *in personam*, and the court is without power to proceed upon substituted service. Counsel also contend that the relief sought is within section 1834, R. L., which provides that circuit judges may hear and determine in equity, "Suits and proceedings for enforcing and regulating the execution of trusts, whether the trusts relate to real or personal estate." Assuming for the purposes of this case that the contention of counsel in this regard is correct, still, inasmuch as the relief contemplated by the statute is the same which equity would have granted prior to the enactment of the statute and continues as formerly, *in personam* and not *in rem*, it follows that upon substituted service of the respondents the complainant cannot avail himself of the provision of the statute. Hence, the court is without power to declare the trust, if one exists, or to determine the status of the title to the land. Counsel also contend that this suit is distinguishable from the case of *Borges v. Encarnacao*, 20 Haw. 638. We are clearly of the opinion that the case at bar, upon principle, is in no way distinguishable from that case. In the *Borges* case the relief sought was the removal of a cloud upon a title by the delivering up and cancellation of an alleged fraudulent deed, and we held that the case was purely *in personam*, and that jurisdiction of the person of the defendant, a non-resident, was essential and that it was not acquired by constructive service. It was the essential purpose of that case to annul a deed and establish a title to certain land. So in the case at bar, the complainant seeks to establish a trust with reference to certain land and to have the title to the same established by a decree in himself. This, in the absence of appropriate legislation, the court has no power to do upon substituted or constructive service of process on non-resident defendants.

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Therefore, upon the authority of the *Borges* case, we affirm the ruling of the circuit judge in quashing the service of the summons as attempted to be made upon the respondents, Elizabeth Goodwin and Charles F. Sackwitz. The case is remanded for such other proceedings as may be deemed advisable not inconsistent with this opinion.

F. Schnack (*E. C. Peters* with him on the brief) for complainant.

C. H. Olson (*Holmes, Stanley & Olson* on the brief) for respondents Elizabeth Goodwin and Charles F. Sackwitz.

JOHN H. WILSON *v.* LORD-YOUNG ENGINEERING COMPANY, LIMITED, A CORPORATION, MARSTON CAMPBELL, SUPERINTENDENT OF PUBLIC WORKS OF THE TERRITORY OF HAWAII, J. J. FERN, MAYOR OF THE CITY AND COUNTY OF HONOLULU, ANDREW ADAMS, T. H. PETRIE AND S. C. DWIGHT, LOAN FUND COMMISSIONERS, AND J. H. FISHER, AUDITOR OF THE TERRITORY OF HAWAII.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED APRIL 9, 1912.

DECIDED APRIL 23, 1912.

ROBERTSON, C. J. PERRY AND DE BOLT, JJ.

OFFICERS—*letting of public contracts.*

Under a statute providing for the letting of public contracts to the lowest responsible bidder, the refusal of the awarding officers to award a contract to the lowest bidder can be justified only when it has been made to appear upon a public hearing and investigation conducted with fairness, impartiality and thoroughness that he is not a responsible bidder.

SAME—*meaning of "responsible bidder".*

The phrase "responsible bidder" means one who is not only financially responsible, but who is possessed of the judgment,

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skill, ability, capacity and integrity requisite and necessary to perform the contract according to its terms. In determining the question of the responsibility of a bidder awarding officers have a wide discretion, but that discretion must be exercised fairly, honestly and judicially.

SAME—uncertainty in specifications.

The specifications for a public contract upon which bids are requested should include every element essential to furnish a common standard by which to measure the respective bids, and where they are so indefinite or misleading as to prevent real competition between the bidders, no valid contract can be based upon them. Where, in a call for tenders for the construction of a road, no time was fixed within which the work should be completed, but the bidders were required to state in their bids the time in which they would agree to complete the work, and neither the call for tenders nor the specifications stated the value which would be placed upon the difference in time, and the awarding officers were not bound to consider the difference in time in which the bidders agreed to complete the work in determining who was the lowest bidder, held that the specifications were fatally defective and no contract could be awarded on them.

OPINION OF THE COURT BY ROBERTSON, C. J.

This is an appeal from a decree of a circuit judge, sitting in equity, whereby the respondents were perpetually enjoined from performing, or partaking in the performance of, a certain contract for the construction of a public road in the City and County of Honolulu. The contract was awarded to the respondent, Lord-Young Engineering Co., Limited, by the respondents Campbell, Fern, Adams, Petrie and Dwight, acting as a commission appointed pursuant to section 5, Act 166 of the Laws of 1911. The complainant, who was an unsuccessful bidder for the contract, brought this suit as a taxpayer alleging that he and not the Lord-Young Engineering Co. was the lowest responsible bidder. The statute (Act 62 of the Laws of 1909, as amended by Act 47 of the Laws of 1911,) provides that, with certain exceptions, no expenditure of public money where the sum to be expended shall be one thousand dollars or more shall be made except under contract let after public advertisement

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for sealed tenders, and that all such contracts shall be made with the lowest responsible bidder after publication for not less than ten days of such call for tenders. The complainant's contentions were that the commission, in determining who was the "lowest responsible bidder" was charged with the duty of granting a hearing before arriving at a conclusion, and was required to make a fair and reasonably thorough investigation of the facts before making a decision; also that the specifications accompanying the call for bids were fatally uncertain in not stating a time in which the contract must be completed. The circuit judge, without passing on the question of the validity of the specifications, based his decree on the point that the decision in favor of the Lord-Young Engineering Co. was of no validity for the reason that in determining the question before it the commission had acted in secret and without granting an open hearing before making an award.

Additional facts are to be found stated in the opinion of Mr. Justice Perry wherein also are contained our reasons for holding that the specifications upon which the bidders based their tenders were so indefinite and uncertain in respect to the time within which the contract was to be performed as to prevent real competition between the bidders, and that a valid contract could not be founded on them. That ground alone is enough to require the affirmance of the decree, but in view of the importance of the case because of the fact that public contracts are constantly being let by officers acting under the statute here involved we deem it our duty to express our views with reference to the procedure followed by the commission in considering the bids and awarding the contract in question.

The trial judge found as a fact that the complainant was the lowest responsible bidder and the finding was fully supported by the evidence. That alone would not, however, be conclusive of the complainant's right to the relief sought because if upon a fair and impartial public hearing the commission had found up-

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on any substantial evidence that the complainant was not a responsible bidder, though the lowest, that finding, though erroneous, would not be disturbed by the court in the absence of a showing of fraud, or collusion, or arbitrary action amounting to fraud. It is admitted that the consideration and determination of the question of the complainant's responsibility was done, not at an open meeting of the commission, but behind closed doors. But it is argued that if in fact the investigation was fair, impartial, and sufficiently thorough, the decision ought not to be disturbed for the reason alone that the meetings were not open to the public. Assuming, without deciding, that the point is well taken, and conceding that there was no evidence that any improper motive influenced the action of the commission, yet the record shows that the investigation made was not conducted with that fairness, impartiality and thoroughness which should characterize proceedings of a judicial or quasi-judicial nature. At the meeting of the commission at which the bids were opened a general discussion was had in the course of which the statement was made that Wilson had failed to fulfil certain contracts which had been awarded him at previous times, but no action with reference to awarding a contract was taken. At the next meeting, after further discussion, the chairman was directed to investigate and report as to the responsibility as contractors of the three lowest bidders. At the third meeting the chairman made a verbal report, the substance of which, after the meeting, was reduced to writing, and appears in the minutes of the proceedings of the commission as follows:

"THE LOAN FUND COMMISSION,
CITY AND COUNTY OF HONOLULU.
GENTLEMEN:

At a meeting of this Commission held on September 29th, 1911, I was authorized and directed to investigate the responsibility as contractors of Mr. Theo. Bauman, the Lord-Young Engineering Company, Limited, and Mr. John H. Wilson.

I beg to make the following report:

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I have found no record of irresponsibility on the part of Theo. Bauman as a contractor. I am informed by credible business men that his record is good.

So far as I can learn the Lord-Young Engineering Company, Limited, also has a good record for responsibility as contractors, as an instance of which it is stated that although they are reported to be losing on one of their operations by contract, namely the Hilo Breakwater, now under way, they are continuing to perform their obligations in good faith. Our engineer, Mr. Gere, has a criticism of Mr. Young's attitude toward the Queen Street paving proposition for the City and County Government, but I did not understand Mr. Gere to question the responsibility of the firm as contractors.

I am informed that Mr. J. H. Wilson has failed to complete two contracts which he has undertaken, one for the County of Kauai, and one for the Territory. I have sent a wireless message to the Vice-Chairman of the Kauai Board of Supervisors, asking for information bearing on the Kauai contract. I am informed that the County of Kauai was not put to additional expense by the failure of Mr. Wilson to complete his contract. I understand Mr. Wilson claimed that certain machinery used by him was not delivering the guaranteed amount of material and that, therefore, he could not perform the work as rapidly as he had expected to be able to do. I understand also that the County Government of Kauai caused an engineer to be sent to them from Honolulu and that after certain repairs were made to the machinery it was found to have the capacity of delivering a greater amount of material than was required. I understand further that the Kauai authorities claimed the machinery had not been properly operated by the contractor. I would state that I am informed that the machinery used by Mr. Wilson on the Kauai contract under question is a duplicate of the plant which the Supervisors of the City and County of Honolulu will lend to this Commission for use on Section No. 1 of the Oahu Belt Road, the bids for the construction of which are now being considered by this commission.

I quote the following from a published report of the Superintendent of Public Works, now incorporated in the public records, under the title

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‘Loan Appropriations.

Completion and Extension of Sewerage, Honolulu.

A contract was made July 5th, 1899, with J. H. Wilson under the firm name of Wilson & Whitehouse, for the construction of the Outfall Sewer, the same to be completed July 1st, 1900, but his progress was so slow that at the expiration of the time specified little had been accomplished beyond laying that part of the Outfall which consists of vitrified pipe, a length of 1500 feet in shallow water, and his methods were so manifestly inadequate for the carrying out of the work, that on September 10th, the contract was taken away and the work continued by the Government. The completion of his contract would have entitled him to receive a total amount of something in excess of \$28,000. The actual payment made to him under the contract amounted to \$6,656.60.’

I am informed that since the last above mentioned contract Mr. Wilson has performed satisfactory work by contract on Maui, and also that under the last Board of Supervisors he completed the Kahana beach contract on this island to the satisfaction of the Supervisors.

Respectfully submitted,

ANDREW ADAMS.

Honolulu, October 3rd, 1911.”

In addition to what is contained in the written report it appears that the chairman stated that he had been told by W. E. Rowell, who was superintendent of public works at the time of the letting of the outfall sewer contract, that Wilson’s bid for the work was ridiculously low and his methods were all wrong, but that he did not blame Wilson as he thought no man could have done the work for the amount of the bid. The chairman also stated that he was informed that Wilson’s bondsmen on that contract had lost about twenty-one hundred dollars which Wilson had never made good; that in connection with the road contract on the island of Kauai the Hawaiian Sugar Company had lost four hundred dollars; and that the manager of the company’s plantation had stated that he did not care to have any further business connection with Wilson. It was not explained

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how the Hawaiian Sugar Company became concerned with Wilson in the contract referred to, nor how the loss was incurred. The chairman further reported that Mr. Gere, the county engineer, said that that part of the Kauai road which was built by Wilson was known as the best part of the road; and he quoted Mr. Gere as saying of Wilson that "He was a very good man, he could do the work if you keep after him, but you had to keep after him all the time to get the work done." Two members of the commission expressed their opinions to the effect that they did not regard Wilson as a responsible bidder. Another member took the opposite view, urged the fact that Wilson had satisfactorily executed several road building contracts and suggested that Wilson be given a hearing. At the conclusion of the discussion the commission decided by a vote of four to one to award the contract to the Lord-Young Engineering Company as the lowest responsible bidder.

The testimony given by the chairman of the commission before the circuit judge shows that in making the investigation he did not have in mind Wilson's financial responsibility nor his ability and skill to do the work. He seems to have regarded those qualifications as being conceded. He testified that his inquiries were directed solely to the question whether Wilson was "the type of man who stood from under when he got into a hole," or would "live up to his contracts whether pinched or not."

The evidence shows that the principal charges made against Wilson—and the only charges which need be referred to here—were his failure to complete the work under the outfall sewer contract and the Kauai road contract. With reference to those matters neither the commission or its chairman made any attempt to get from Wilson any statement as to why he failed to carry out his contracts. No opportunity was given Wilson to present his side of the case though he was available and, appar-

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ently, anxious to explain. At the hearing in the court below Wilson testified in explanation as to why he had not fulfilled those two contracts and adduced testimony of disinterested witnesses as to his skill, ability and experience as a builder of roads, as well as to his business integrity, and if an opportunity had been given him to present the evidence to the commissioners it would probably have sufficed to convince them of Wilson's responsibility. The commission's investigation was not a thorough one. Its action was arbitrary and unfair because it was done in secret and was based on what amounted to no more than an *ex parte* hearing at which no opportunity was offered for an explanation or a showing of any kind to be made by or on behalf of the lowest bidder in the interest of the taxpayers. *Chippewa Bridge Co. v. Durand*, 122 Wis. 85; *State v. Commissioners*, 39 Oh. St. 188, 192; *Faist v. Hoboken*, 72 N. J. L. 361; *Jacobson v. Elizabeth*, 64 Atl. (N. J.) 609.

In considering tenders for public contracts under a statute providing for the letting of contracts to the lowest responsible bidders, the awarding officers have a wide discretion. But that discretion must be exercised fairly, honestly and judicially. The phrase "responsible bidder" means one who is not only financially responsible, but who is possessed of the judgment, skill, ability, capacity and integrity requisite and necessary to perform the contract according to its terms. The duty of such officers in considering and determining those matters is an important and responsible one, and one upon the performance of which the taxpayers have the right to insist. The refusal to award a contract to the lowest bidder can be justified only when it has been made to appear upon a proper hearing and investigation that he is not a responsible bidder. 2 Dillon, Mun. Corp. (5th ed.) Sec. 811.

The decree appealed from is affirmed.

R. B. Anderson (Kinney, Prosser, Anderson & Marx on the brief) for complainant.

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E. W. Sutton, Deputy Attorney General (Alexander Lindsay, Jr., Attorney General, with him on the brief), for respondents Oahu Loan Fund Commissioners.

CONCURRING OPINION OF PERRY, J.

One of the grounds of the petition is that the contract and the award are null and void for the reason that "the said specifications and advertisement for bids were indefinite, uncertain and incomplete in that they did not name any time within which the work thereunder was required to be completed and did not state whether or not the time for completing the work named by a bidder would be considered by the commissioners in determining the lowest responsible bidder or provide any means of fixing or estimating the value in money of the difference in time between the several bids so that intelligent and exact bidding and fair and equal competition was impossible, and it was and is impossible for the commissioners to definitely ascertain who among the bidders for said contract was, in fact, the lowest responsible bidder therefor." The published call for tenders required that all bids for the construction of the road should be filed with the commission on or before September 28, 1911. The Lord-Young Engineering Company offered to do the work specified for the sum of \$79,710 and to complete it by September 1, 1912. The complainant presented a bid in the sum of \$79,367, performance to be completed by December 1, 1912. Other bids in due form, with time of completion, were those of T. Bauman, \$88,950, September 30, 1912; L. M. Whitehouse, \$93,518, October 31, 1912; Concrete Construction Company, Limited, \$91,462, October 31, 1912, and the Honolulu Draying & Construction Company, \$109,250, January 31, 1913.

The specifications related to the grading, metaling and oiling of 26,358.7 linear feet of highway, the construction of culverts, drains, ditches and walls, the removal and erection of fences

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and the making of other improvements incidental to the construction of the road and contained, inter alia, the following provision: "Each bidder shall state in his proposals (1) a specific sum for which he will furnish all labor, tools and material, except as specified to be furnished by the City and County of Honolulu, necessary to complete the work according to the plans and these specifications; (2) the time within which he will agree to complete the work." The published call for tenders contained the same provision and in the form of bid prescribed by the commission was the following clause on the subject: "I hereby agree to fully complete the work specified on or before the day of, and that for each and every day thereafter that the contract remains uncompleted the sum of twenty (\$20.00) dollars shall be deducted from the amount due on said contract, and it is hereby expressly understood and agreed that said sum shall be deemed and taken in all courts to be the liquidated damages for the non-completion of the work in the time aforesaid and not in the nature of a penalty." In none of these three instruments was any further specification or statement set forth relating to the time of the completion of the performance of the contract.

Act 166 of the Laws of 1911, appropriating \$200,000 for "belt roads and bridges" in the City and County of Honolulu, provides in section 3 that "the provisions of Act 62 of the laws of 1909, and amendments thereto, shall apply to all said items to the same extent as if they were a part of this Act", with exceptions not material to this case. Act 62 of the Laws of 1909, as amended by Act 47 of the Laws of 1911, in turn provides that "no expenditure of public money * * * where the sum to be expended shall be One Thousand Dollars (\$1,000.00) or more, shall be made, except under contract let after public advertisement for sealed tenders, in the manner provided by law," and that "all such contracts * * * shall be made with the lowest responsible bidder and after publication of a call for

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tenders for not less than ten days in a newspaper of general circulation printed and published within said Territory." In other words, expenditures under the appropriation referred to can be incurred only under contract with the lowest responsible bidder after an advertised call for tenders. Such statutory provisions are based upon motives of public economy and originate in some degree of distrust of the officers to whom the duty to make contracts for the public service is committed. *Frame v. Felix*, 167 Pa. St. 47. Their object is "to prevent favoritism, corruption, extravagance and improvidence in the awarding of all public contracts. * * * A fair competition among the bidders is the prime object of such statutory provisions and anything which tends to impair this is illegal. * * * Such a provision requires such information to be put within the reach of bidders as will enable them to bid intelligently and will enable the official having charge of the proposed work to know whose bid is the lowest." *Lucas v. American-Hawaiian Engineering & Construction Company, Limited*, 16 Haw. 80, 90. As stated in another case, the objects sought are "to secure to the state the benefit and advantage of fair and just competition between bidders and at the same time close, as far as possible, every avenue to favoritism and fraud in its varied forms * * * and to insure the accomplishment of the work at the lowest price by subjecting the contract for it to public competition. * * * In order to effectuate this it is manifest that where something is to be done that is required to be submitted to competition every essential part of it that goes to make up the whole of it must be submitted to such competition." *Frame v. Felix*, supra. "The character of the work and the materials of which it shall be composed must be decided in advance." *Lucas v. Construction Co.*, supra. So also should the specifications include every other element essential to furnish a common standard by which to measure the respective bids. The use in the statute of the expression "lowest (responsible) bidder" neces-

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sarily implies as much. Any indefiniteness in the specifications permitting of favoritism or rendering it impossible to determine by a common standard which is the lowest bidder frustrates the purpose of the statute and invalidates the award and contract. *Mazet v. Pittsburgh*, 137 Pa. St. 548; *Ertle v. Leary*, 114 Cal. 238; *Ricketson v. Milwaukee*, 47 L. R. A. (Wis.) 685; *Chippewa Bridge Co. v. Durand*, 99 N. W. (Wis.) 603. "Genuine competition can only result when parties are bidding against each other for precisely the same thing and on precisely the same footing." *Lucas v. Construction Co.*, supra.

The specifications in the case at bar fail in at least one respect to comply with these requirements. They are indefinite and misleading with reference to the time within which the contract is to be performed. The natural inference from what is said in the specifications, form of bid and call for tenders is that time will be deemed of importance by the commission and will be considered in making an award, but of how much importance and of what monetary value it would be impossible for intending bidders to ascertain from those instruments. Each bidder was left at liberty to name his own time. Within certain limits, at least, a shortening of the period for construction would ordinarily result in greater cost to the contractor and consequently to the taxpayers and a lengthening of it in a decrease of the cost. Each of the bidders made his tender in ignorance of the time to be named by each of the others and was given no opportunity of meeting opposing bids upon the same allowance of time. The commission did not express itself in the instruments under consideration as being bound to consider the element of time and it was open to it either to consider or to disregard the differences in the bids in that respect and, if the element was taken into consideration, to give as great or as low a monetary value to the difference as it should see fit. The specifications and advertisement left the commission at liberty to choose either a bidder who had named the lowest price and

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a longer period of time or one who had named a higher price and the lowest period of time. The case at bar furnishes a good illustration of the purpose and necessity of specifications concerning this element. With a difference of only \$343 between the two leading bids would not the commission be justified in regarding that of the Lord-Young Company as the lowest and most favorable to the taxpayers? The difference in time between these two bids is ninety-one days. Would it not be reasonable for the commission to find that the use of the highway by the public during that period of time was well worth more than \$343, and that the cost to the taxpayers of a capable officer to inspect the progress of the work during that period would exceed that sum? On the other hand, the commission was at liberty under the specifications and advertisement in spite of these considerations to award the contract to Wilson for the reason that the sum of money named by him was \$343 less than that of his competitor. There was an opportunity for favoritism and the City and County did not have the benefit of real competition measured by a common standard with the bidders on precisely the same footing. It is not an answer to this to say that the undisputed evidence was that the commission did not attach any importance to the differences in time. It is, at best, difficult for one to say with precision what motives impel his acts. Aside from that, however, the vice was in the specifications at the time of the call for tenders and in the tenders when filed and cannot be cured by the subsequent action or inaction of the commission. The absence of genuine competition still exists. Nor is it an answer that the bidders themselves filed their bids without raising the objection or that this complainant apparently did not appreciate its force until after the respondents' answers were filed. The defect in the specifications and its consequences to the taxpayers are not for that reason any the less real.

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Kneeland v. Furlong, 20 Wis. 460, is a case in which it was held, under a charter provision substantially like that of our statute, that the time of performance is an essential element to be named in such specifications. The court says: "Work cannot be let to the lowest bidder, within the meaning of the city charter, unless the bidders are informed before bidding of the terms or principal stipulations of the contract each successful bidder is to enter into. Bidders should be informed either by the notice of the letting or by the specifications * * * of the terms of the contract; at least of the quality or amount of work, whenever it can be specified, to be included in any one contract; the time within which it is to be finished; the manner in which it is to be done; and, if materials are to be furnished, their quality. All this we think the charter requires."

To furnish a common standard for the competition either a reasonable time should be named in the specifications for the performance of the contract (or two or more alternative, reasonable periods), or, if the bidders are left to name the proposed time of completion, the specifications should state the value of the difference in time between bids and thus furnish the means of reducing the bids to a common standard of measurement, or if one or more periods for performance are specified liberty may be given to the bidders to name a different period, the value of the difference in time being in such event also stated, or it should be specified that the award will be to the bidder (responsible) naming the lowest price irrespective of the time required by him for the performance of the contract.

It is clear, without reference to the other grounds named in the bill of complaint, that the injunction prayed for and granted must stand and the contract in effect be set aside. Upon a new and valid call for tenders it may be that, aside from any question of his responsibility, Wilson will not be the lowest bidder, or it may be that, if he is the lowest bidder, the commissioners will find him to be the lowest responsible bidder and that fur-

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ther evidence on the issue of his responsibility, whether for or against him, will be adduced before the commissioners or before the trial judge in a suit for injunction or before both and it may also be that the commissioners, in the light of the contentions and arguments in this case on the subject of the secrecy of their meetings in the past, will adopt for the future a different view of their rights and their duty in that respect.

Under these circumstances I base my concurrence in the affirmance of the decree upon the sole ground that the specifications were fatally defective and the award and the contract for that reason invalid. Consideration of the other grounds is unnecessary to the decision of the case now before the court.

A. V. GEAR v. WILLIAM HENRY.

ERROR TO DISTRICT MAGISTRATE OF HONOLULU.

ARGUED APRIL 24, 1912

DECIDED APRIL 30, 1912

ROBERTSON, C. J., PERRY AND DE BOLT, JJ.

PROCESS—when issued—service of—returnable.

Process is issued when prepared and placed in the hands of a person authorized to serve it with the intent to have it served.

Process issued and served on the day it is made returnable is not in compliance with the statute. R. L. Sec. 1705.

APPEAL AND ERROR—jurisdiction—void judgment—appeal therefrom.

Where the district magistrate has not acquired jurisdiction of the person of the defendant and enters judgment against him by default, the judgment is void, and an appeal may be taken therefrom without a preliminary motion to set aside the judgment.

OPINION OF THE COURT BY DE BOLT, J.

This is a writ of error to review a judgment entered by the district magistrate of Honolulu in an action of replevin, where-

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in A. V. Gear, the defendant in error, was the plaintiff and William Henry, the plaintiff in error, was the defendant. One phase of this controversy, brought up by appeal on points of law, was recently before us for consideration. Ante, 54.

The summons in the action of replevin was signed by the magistrate at the request of the plaintiff's attorney and delivered to the latter on December 30, 1911, and made returnable on January 2, 1912, at 1:30 p. m. The possession of the summons was retained by the plaintiff's attorney until about 10:30 a. m., January 2, when, as he claims (the record not being entirely clear on this point), he filed it with the magistrate's clerk, paid the costs and then delivered it to the sheriff for service who served it on the defendant at about 11 a. m. At 1:30 p. m. (the hour designated in the summons for the appearance of the defendant), upon the case being called by the magistrate for trial, the defendant, appearing specially by counsel, moved to quash the summons on the ground that it had not been issued in compliance with the statute, which, in this respect, requires that "All original writs shall be returnable not less than one nor more than six days from the date of issue." R. L. Sec. 1705. The motion to quash was denied, and thereupon the defendant's counsel orally noted an appeal to the supreme court on points of law, and made no further appearance in the case. Then, on motion of the plaintiff, the defendant was "called," and making no response, was declared in default, and the case was continued until January 3, for proof, when the judgment complained of was entered.

The denial of the motion to quash and the entry of the judgment constitute the chief errors assigned by the defendant.

The plaintiff contends that the summons was "issued" on December 30, 1911, the date on which it was signed and delivered by the magistrate to his attorney; that the summons was made returnable within the statutory time; that the magistrate acquired jurisdiction of the person of the defendant; and

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that the judgment is valid. The defendant contends, however, that the "date of issue," as regards the summons, was January 2, that being the date on which it was delivered to the sheriff for service; that the summons was issued and made returnable on the same day, namely, January 2, 1912; that the magistrate did not acquire jurisdiction of the person of the defendant; and that, therefore, the judgment entered against him is void.

The date of signing a writ or summons by the magistrate is not, necessarily, the "date of issue." The summons in question, in our view of the case, was not "issued," in the sense contemplated by the statute, by the mere signing and delivery of it by the magistrate to the plaintiff's attorney, who had no authority to serve it. Process is "issued" when it is prepared and placed in the hands of a person authorized to serve it with the intent to have it served. Anderson's Law Dict., 568; 32 Cyc. 425; *Houston v. Thornton*, 122 N. C. 365, 374; *White v. Johnson*, 27 Ore. 282, 297; *Howell v. Shepard*, 48 Mich. 472, 474. The summons in the case now before us was not placed in the hands of the sheriff, a person authorized to serve it, until the morning of the day on which it was made returnable. The requirements of the statute were not complied with. The defendant was not legally served and he could have disregarded the summons. The magistrate did not acquire or have jurisdiction of the person of the defendant. The judgment entered against the defendant, therefore, is void. *Gouveia v. Nakamura*, 13 Haw. 450.

Counsel for the plaintiff in addition to his argument on the merits, contends that the defendant was in default, and that there can be no appeal from a default judgment. He cites *Luce v. Chin Wa*, 5 Haw. 629, as authority, which is clearly distinguishable from the case at bar. In that case the magistrate had acquired jurisdiction of the person of the defendant by proper service and the failure of the defendant to appear

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at the time designated in the summons authorized the magistrate to enter judgment against him.

Counsel for the plaintiff also urges that the defendant is not entitled to have the judgment reviewed for the further reason that he has not moved the magistrate to vacate or set it aside. There is no merit in this contention. "Where the trial court had no jurisdiction of the person of appellant, an appeal may be taken without a preliminary motion in the trial court to set aside the judgment." 2 Ency. Pl. & Pr. 103.

While it appears to be generally conceded that a void judgment may be wholly disregarded and treated as a nullity, whenever any right is claimed under it, whether it has been appealed from and set aside by a competent court or not, it appears also to be the practice for courts of review to entertain appeals from void judgments for the purpose of reversing and purging the record of them, even though the defendant was in default. *Id.* 102; 6 *Id.* 224; 2 Cyc. 590, 617, 618.

The judgment of the district magistrate is reversed.

A. A. Wilder (*Thompson, Wilder, Watson & Lymer* on the brief) for plaintiff in error.

C. F. Peterson for defendant in error.

IN THE MATTER OF THE DISPUTE BETWEEN ALFRED RANNIE HENDERSON AND JOSHUA D. TUCKER, COMMISSIONER OF PUBLIC LANDS OF THE TERRITORY OF HAWAII.

APPEAL FROM CIRCUIT JUDGE, FOURTH CIRCUIT.

ARGUED APRIL 17, 18, 1912.

DECIDED MAY 2, 1912.

ROBERTSON, C. J., PERRY AND DE BOLT, JJ.

PUBLIC LANDS—*freehold agreement—planting and care of trees.*

Under section 326, R. L., trees growing naturally upon the land

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may be counted as in compliance with the requirement as to "the planting and care of not less than an average of ten timber, shade or fruit trees per acre;" the word "and" in the sentence quoted is to be construed as "or."

SAME—maintenance of home.

Under chapter 22, R. L., a distinction exists between "residence" and "home." The occupying of a house on a certain piece of land, for the length of time required to obtain title, without making it a home within the proper meaning of the term, but for the purpose merely of making a showing to obtain a patent to the land, and with the intention of going to live elsewhere immediately upon the expiration of that time, does not constitute a compliance with the requirement of section 326, R. L., to maintain a home on the premises, for the intention and good faith inseparably involved in the idea of the maintenance of a home are not present.

SAME—assignment of interest under freehold agreement.

An agreement between a freeholder and another whereby the former, for a valuable consideration, gives to the other the right to enter upon the land held under a freehold agreement and to grow and harvest crops of sugar cane thereon constitutes an assignment of a part of the freeholder's interest under the freehold agreement within the purview of section 326, R. L.

SAME—cultivation of land.

The cultivation of premises in compliance with the statute must be done by the freeholder or for him by his servants or agents. The crops grown must be the crops of the freeholder and not those of another.

OPINION OF THE COURT BY ROBERTSON, C. J.

Alfred R. Henderson, the appellee, on the 18th day of July, 1907, took up a parcel of government land situate at Kaiwiki 3, Hilo, Hawaii, under a "cash freehold" agreement, the land being described in the agreement as Lot 33, Map 2382, area 25.95 acres, first class agricultural land. The purchase price was \$1610, payment of one-fourth of which was acknowledged. The terms of the agreement, set forth in the words of the statute applicable to such cases (R. L. Sec. 326) so far as they are important to this case, were as follows: (1) Payment of the balance of the purchase price in three equal annual instalments with interest; (2) Cultivation of not less than twenty-

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five per centum of the area of the premises and the planting and care of not less than an average of ten timber, shade or fruit trees per acre at any one time before the end of the third year; (3) maintenance by the freeholder of his home on the premises from the end of the first to the end of the third year; (4) He shall not assign or sublet his interest, or any part thereof, without the written consent of the commissioner of public lands. And the agreement contained a clause to the effect that if at the end of three years all the conditions shall have been substantially performed the freeholder would be entitled to a land patent for the premises. The second and third payments on account of the purchase price were duly made and receipted for. The final payment, \$402.50, was made on July 18, 1910, for which the land agent gave a special or temporary receipt, and the evidence shows that the amount was not paid into the public treasury but was deposited in a bank in the name of the chief clerk of the land office as a special deposit pending the issuance of the land patent. The evidence shows that the patent was made out and signed by the commissioner of public lands, but it does not appear to have received the signature of the governor, and it has not been issued or delivered to the appellee. In the mean time the matter was referred to the attorney general, and the commissioner of public lands notified the appellee that a patent would not be issued to him unless his right thereto should be established in court.

Pursuant to section 274 of the Revised Laws, the commissioner of public lands, acting through the attorney general, instituted these proceedings before the circuit judge for the purpose of determining whether the appellee had substantially performed the conditions of the agreement so as to entitle him to receive a land patent. Issue was joined on the questions whether the conditions as to cultivation, planting and care of trees, maintenance of home, and against assigning and subletting had been fulfilled. The circuit judge found in favor of

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the appellee on all the points and made a decree directing the issuance of a patent for the premises to him. From that decree the commissioner of public lands brings this appeal.

Fraud in the initial application for and taking up of the land was not alleged, and no issue as to that is involved.

We will proceed at once, therefore, with the consideration of the four questions at issue.

1. As to trees. There are two phases of this question, one of law, whether the statute and agreement permit to be counted trees naturally growing on the land at the date of the agreement, and one of fact, whether the required number of trees were growing on the land. The requirement is "the planting and care of not less than an average of ten timber, shade or fruit trees per acre." The appellant contends that this language is clear and that it means that the freeholder shall plant and care for that number of trees on his lot even though trees of the designated kinds have already been provided by nature. Section 326 of the Revised Laws provides, *inter alia*, that "Such freehold agreement shall authorize the freeholder to occupy and use the premises therein described and shall entitle him to a land patent for such premises at the end of three years from the date of the payment of such first instalment which shall be the date of the freehold agreement if the following conditions shall then have been substantially performed;" then follow the conditions hereinabove referred to as terms of the agreement, and also this provision: "Conditions for the prevention of waste, the planting of trees or the protection of trees growing or to be planted on such premises," etc. That is to say, the statute contemplates that freehold agreements should contain such provisions regarding the planting of trees and the protection of trees growing or to be planted on the land as would be desirable and appropriate under the circumstances of each case according to whether or not the land is wooded entirely, partly, or not at all. Although the printed form of

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agreement which was used contains several blank lines in the place appropriate for stating conditions regarding the planting or care of trees no such conditions were written in, and the only reference to trees contained in the agreement was that above mentioned as term (2). To construe the clause of the statute from which that term of the agreement was taken as meaning that in every case the freeholder must plant an average of ten trees per acre would be absurd when applied to land already heavily timbered, and entirely unnecessary when applied to land having a natural growth of as many as ten trees to the acre. In view of the subsequent provision contained in the same section of the statute, above quoted, the word "and" in the clause "the planting and care of not less," etc. must be construed as "or," and the corresponding clause in the agreement (term 2) should be given a like construction. The result, therefore, is that if there were growing naturally on the appellee's lot the necessary number (260) of timber, shade or fruit trees they should be counted, and if, as appears to be the fact, the appellee gave them such care as such trees require, the condition must be held to have been complied with. On the question of fact whether there were as many as two hundred and sixty trees growing on the appellee's lot there was a conflict of testimony that is difficult to account for. The appellee admits that he planted no trees because, as he contends, there were more than the required number of kukui, ohia and lauhala trees growing naturally on the land by actual count. In this he was corroborated by a neighbor who was called as a witness. Two witnesses for the appellant testified that they counted only eighty-three trees and that there were no more than that. The evidence shows that the trees were growing in two steep gulches where there was a heavy undergrowth and probably it was difficult to make an accurate count. Under the circumstances we think the finding of the circuit judge, who saw and heard

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the witnesses, that the required number and kinds of trees were there, should not be disturbed.

2. Maintenance of home. The freeholder is required to maintain his home on the premises from the end of the first to the end of the third year. The evidence shows that the appellee is an unmarried man, a blacksmith by trade, and employed by the Hakalau Plantation Co. at a salary of one hundred dollars a month. The premises in question are about two and one-half miles from the plantation. At the time he took up this land he lived in a house on the plantation, and continued to live there until he moved on to his lot at Kaiwiki. In the month of June, 1908, he had the plantation company build a house and stable for him on one corner of the lot. It was a rough board house, of one room, 10 by 12 feet, and the stable was a small one. The two structures cost about \$160 or \$170, the appellee being unable to state the exact amount, the expense being, as he supposed, charged to his account, but he had not paid any part of it. The appellee testified that on July 18, 1908, he began to live in his house to which he had sent a bed and bedding, a chair, table, lamp, oil and some books and writing material; that he made his home there continuously until July 19, 1910, when he moved back to the same house he had previously occupied on the plantation; that during the period of two years he had slept at his house on the homestead lot every night except three or four nights a month when he stayed overnight elsewhere with friends; that he kept at his house at Kaiwiki his working clothes and a change of clothing, but left at the plantation house his trunk and some other clothing, including his Sunday clothes; that a bureau, chairs and a bed, but no bedding, remained in his former quarters, which were unoccupied by others, and he occasionally used them "for convenience;" that he kept shaving utensils at both places; that sometimes he spent Sundays on the Kaiwiki premises; that there was a privy on his lot but no water supply or bathing fa-

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cilities; that he took his meals at the plantation boarding house, and had no cooking utensils at his house; that since July 13, 1910, he had been to his place occasionally and still regarded it as his home. He testified also that he intended to live there always "as soon as the place is declared mine and the government builds a road to it." It appears, however, that the government had previously built a road to it. In regard to his sleeping at his house the appellee was corroborated to a certain extent by the testimony of a fellow employe at the plantation who was also engaged in proving up on a piece of land at Kaiwiki. The witness testified that during the two years in question he and the appellee nearly every evening after dinner left plantation headquarters together on horseback to go to their respective places; that generally, after riding about a quarter of a mile, they separated, one going by one road and the other proceeding by another to their lots, though occasionally they went the whole way together. Another witness, also a resident of Kaiwiki, testified to frequently having seen the appellee on the road going up toward or coming down from the direction of his house. On the other hand, four persons who lived in the vicinity of the appellee's lot at Kaiwiki testified to having seen the appellee but seldom at his house. Their testimony was of a negative character and not entitled to much weight. But another witness called by the appellant who spent a portion of his time at Kaiwiki near the appellee's place testified that, desiring to know for his own satisfaction whether the appellee was living in his house, in October, 1908, he put some putty in the key hole of the door of the appellee's house so that the door could not be unlocked without disturbing the putty, and that the putty remained undisturbed until sometime in December when the witness picked it out with a knife. This witness was not impeached nor was his testimony materially shaken. One Swain, a government ranger, testified that he visited the appellee's place once in February, twice in March

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and once in July, in the year 1910, and found no signs of recent presence there of a horse. On July 25, 1911, the witness went into the house and found the bedding rolled up, the floor and furniture covered with dust, rat droppings and cobwebs, and many mud-wasp nests on the ceiling and walls. A careful examination of the testimony leads us to believe that the appellee did not spend as many nights at Kaiwiki during the two years in question as his testimony would indicate. It is only fair to say, however, that except for the connection which he maintained with his former quarters at the plantation, as above explained, the appellant failed to show that the appellee lived elsewhere than at Kaiwiki during the period. The evidence shows that since building the house the appellee has done nothing toward improving or beautifying the place, and that he has planted no trees or plants about the house. As having a bearing on this question it may be stated that of the four instalments paid on account of the purchase price of the land, three, amounting to \$1206, were advanced by the plantation company at the appellee's request, one instalment and the accrued interest on all having been paid by the appellee, as he put it, "out of my own money."

It is to be noticed at the outset that the legislature has recognized a distinction between a residence and a home. Thus, in section 291 of the Revised Laws, relating to "homestead leases," it is provided that the occupier shall, before the end of two years from the date of the certificate of occupation, build a dwelling house on the premises and begin to *reside* there; and that he shall, from and after the end of two years, continuously *maintain his home* on the premises. And in section 319, enumerating the conditions of "right of purchase leases," it is provided that the lessee shall from the end of the first year to the end of the fifth year continuously *maintain his home* on the premises, while in section 322, relating to the same class of leases, it is provided that the lessee shall be entitled to re-

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ceive a patent for the land in fee simple upon his paying the appraised value of the land, if he has performed all the conditions, and has *resided* on the land not less than two years. Referring to these provisions this court in *Hapai v. Pratt*, 19 Haw. 1, 3, said, "It will be observed that the condition in the lease cannot be performed to its full extent by a lessee who shortly after the third year of his term applies for a patent, otherwise he could not get a patent until after the fifth year of his term. So that, so far as the right to a patent is concerned, if the lessee has *resided* on the land for not less than two years, it is immaterial to inquire whether the condition as to continuously maintaining a *home* thereon has been carried out. This is also shown by the statute requiring as prerequisites to obtaining a patent a residence on the land of not less than two years and a substantial performance of all 'other' conditions of the lease. To reside on certain premises and to continuously maintain a home thereon do not mean the same thing, as a person may do either one without doing the other."

The lexicographers give the words "home," "residence," "dwelling," "abode," "habitation" and "domicile" as synonyms. At the same time some of them recognize a distinction as to the word "home." In Webster's New International Dictionary, in a note to the word "habitation" it is said, "Home denotes a dwelling place, but connotes especially all the range of sentiment and feeling associated with it. Home is not a mere synonym for house." Fernald, in his *Synonyms, Antonyms and Prepositions* (p. 201), says, "Home, from the Anglo-Saxon, denoting originally a dwelling, came to mean an endeared dwelling as the scene of domestic love and happy and cherished family life, a sense to which there is an increasing tendency to restrict the word—desirably so, since we have other words to denote the mere dwelling place." The distinction noted by the authorities cited has special application to the case of a man of family. Yet the element of sentiment

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may well enter into the case of an unmarried man, and it may be outwardly manifested by an apparent desire to improve, beautify and make more attractive and interesting his place of abode, though it be a humble one. Particularly would this be practicable, and, indeed, to be expected, where, as in this case, the party is, apparently, financially able to do something along those lines. While the terms of the freehold agreement required the appellee to maintain his home on the land only from the end of the first year to the end of the third year, the fact that the appellee did not begin to live there until the last possible day and ceased to do so on the earliest possible day, taken in connection with what will hereafter appear with reference to the disposition he made of the land lends a color to the character of his residence on the land quite disadvantageous to his claim that he made the place his home. It all tends to show that he took no interest in the place and that it was not regarded by him as a fixed place of abode "with the present intention there to remain." It indicates, on the contrary, an intention to make a technical compliance with what seems to have been a distasteful requirement of his agreement, and shows a kind of residence which, in the last analysis, was merely colorable and entirely lacking in the essential element of good faith. The occupying of a house on a certain piece of land for the length of time required to obtain title, without making it a home within the proper meaning of the term during that period, but for the purpose merely of making a showing to obtain a patent to the land, and with the intention of going to live elsewhere immediately upon the expiration of that time, does not constitute a compliance with a requirement to maintain a home on the premises, for the intention and good faith inseparably involved in the idea of the maintenance of a home are not present. In concluding its opinion in the case of *Hapai v. Pratt*, supra, this court said, "We may add that, if it appeared in any way, as it does not in this case, that the compli-

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ance with the condition as to residence was not made in good faith, a different conclusion might follow."

We do not say that the fact that the freeholder's place of abode lacked cooking or bathing facilities, or that trees were not planted, or that the place was not improved after it was first occupied, or that the freeholder boarded elsewhere, or kept some of his clothing at another place, or that he did not sleep every night at his abode, but often slept elsewhere, or that he received financial assistance, would show an absence of good faith and an intention to make the place his home. But where, as in the case at bar, all these things concur, and it further appears that the freeholder lived on the lot no longer than he considered absolutely necessary, and then returned to where he had previously lived, and it is also shown that he made no attempt to cultivate the land but immediately upon taking it up turned the possession for the purpose of cultivation over to another, the conclusion is irresistible that the place has not been the occupant's home within the meaning of the law. We hold, therefore, that the condition as to maintaining a home on the premises has not been fulfilled by the appellee.

3. As to assignment. The requirement here is that the freeholder "shall not assign or sublet conditionally, or otherwise, his interest or any part thereof, under the freehold agreement, without the written consent of the commissioner of public lands endorsed on such agreement." The evidence shows that at the time the appellee took up this land sugar cane was growing on that part of it where there were no trees, comprising about twenty-three acres. On July 24, 1907, the appellee made an agreement in writing with the Hakalau Plantation Company, a corporation, hereinafter referred to as "the plantation," which recited that the appellee is engaged in cultivating sugar cane on Lot 33, Kaiwiki 3 Homesteads, and has agreed to deliver to the plantation all of the crops growing upon said land for the term of four years in consideration of the advances,

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promises, covenants and agreements of the plantation therein set forth, therefore, the appellee, in consideration of one dollar and further advances to be made by the plantation to assist him to plant, cultivate and harvest said crops of cane, does sell and convey to the plantation, and its assigns, all the cane growing on said land and all future crops thereafter to be planted during said term. The instrument also provided that if the appellee shall pay to the plantation all sums advanced or to be advanced, upon demand, and shall fulfil the other promises, covenants and agreements by him to be kept and performed, the instrument shall be null and void; but in case of default the plantation is authorized to enter into possession of the land and cultivate and harvest the crops of cane growing thereon, and replant the same, charging reasonable prices for all work that may be done or material that may be furnished, applying same to sales of the crops as if same were cash payments made to the appellee. The appellee covenanted and agreed that in case of default in payment of advances, after demand, "this agreement may be foreclosed by advertisement as provided by statute," or the plantation may, at its election, enter into possession of the land, cultivate, harvest, and remove the crops growing thereon, crediting the appellee with the purchase price thereof. It was mutually covenanted and agreed that the appellee will sell and deliver to the plantation all sugar cane that he shall grow on the lands during said term and that the plantation will pay for same at the rate of four dollars per ton of cane when the price of 96° polarization sugar as received by the plantation in New York is four cents per pound net, and a proportionately higher or lower price per ton as the price received by the plantation for sugar in New York might be more or less than four cents per pound. The appellee further covenanted and agreed that in the event of his failing to plant, cultivate, and bring to maturity cane upon all his available land, according to the direction and supervision of

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the plantation for the said term, the plantation may enter into possession of the premises and grow, cultivate and harvest crops of sugar cane for the remainder of said term, charging reasonable prices for all labor and material furnished and crediting the appellee for the cane at the prices agreed to be paid therefor; and the appellee granted to the plantation "for the purposes of this agreement" free access to said land during the whole of said term. On the day of the date of that agreement the appellee addressed to the Hakalau Plantation Co. a letter saying "As I am unable at present to cultivate all of my Lot No. 33, Kaiwiki Homesteads, will you please furnish me with men and mules to do so, and I will pay for same on completion of my crop of cane." On the same day, or very shortly thereafter, an oral agreement was made between the appellee and the plantation by which the appellee agreed, as he testified, "to receive as my share of the cane five dollars per acre," meaning five dollars per acre of the cultivated area per annum. The appellee testified also that he thought it better to take five dollars an acre without the risk of going behind; that he was not prepared to cultivate the land himself; that he made no attempt to exercise any supervision over the land with reference to its cultivation; that he did not consider the written agreement, but only the verbal one which was to last as long as he wanted it; that neither he nor the plantation attempted to live up to the terms of the written agreement; that since July 24, 1907, the plantation has been planting cane on the land under the verbal agreement under which solely the parties have been acting; and that the verbal agreement is still in force. Counsel for the appellee contends that the oral agreement did not supplant the written agreement but merely modified it. Whatever may be the correct view to take of this matter we think the ultimate result would be the same. In either event the plantation was authorized by the appellee to at once enter into possession of the land and to grow, cultivate and harvest thereon crops of

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cane for the term of four years, or indefinitely, paying the appellee five dollars per acre per annum for the use of the land. Under those circumstances the appellee would have no interest in the crops, the cane would belong to the plantation, and the appellee would be entitled to receive only what amounts to an agreed rental of five dollars per acre for the use of the land. It is not necessary to decide whether the situation constituted the relation of landlord and tenant between the parties, or whether the plantation acquired a license coupled with an interest, or some other form of right. See *McCandless v. John Ii Estate*, 11 Haw, 777, 790. Certain it is, however, that when the appellee for a valuable consideration gave to the plantation the right to enter upon the land and grow and harvest crops he transferred to the plantation, in so far as the limited nature of his estate permitted, an interest in the land which we hold amounted to an assignment of a part of his interest under the freehold agreement within the meaning of the prohibition contained in the agreement, and as the assignment was made without the consent of the commissioner of public lands, that condition was violated.

4. As to cultivation. One of the terms of the freehold agreement contained this clause: "Cultivation of not less than twenty-five per centum of the area of said premises * * * at any one time before the end of the third year." These are likewise the words of the statute. This question is quite intimately connected with that of assignment. It has been argued that the clause in question does not provide that the cultivation shall be done by the freeholder, and that as the land was under cultivation at the time the appellee acquired it, the condition was at once fulfilled. Although the clause does not expressly so state, it must be construed to mean that the cultivation is to be performed by the freeholder. We do not mean by this that it is necessarily to be done by the freeholder with his own hands, but that it must be done by him or by his servants

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or agents for him. The crops grown must be his crops and not those of another. A different construction would not accord with the spirit and intent of those portions of the Land Act of 1895 (R. L. Chap. 22) relating to the homesteading of public lands of which the provisions relating to "cash freeholds" are a part. The general purpose and intent of those portions of the statute may be briefly stated to be the settlement and occupation of agricultural and pastoral lands by citizen farmers, and the encouragement of the diversification of local industries, for the social, political and material benefit of the country. To this end it is required that the freeholder shall maintain his home upon the land taken up, and that he shall not assign or sublet his interest therein except with the consent of the commissioner. To this end also he is expected and required to cultivate the land for it is for that very purpose that he is supposed to have applied for it. It is with that object in view that the government offers such lands to settlers at less than their full value and requires them to make oath that they apply for the land solely for their own use and benefit. From what has been stated above with reference to the question of assignment it clearly appears that the appellee has not cultivated twenty-five per cent, or any other portion, of the land as required by the terms of his agreement. We, therefore, hold that in this respect also the appellee has not fulfilled the requirements of his agreement.

It has been urged upon us that it would be a great hardship upon the appellee should it be held that he is not entitled to receive a patent to the land. But the appellee had the law before him. If he did not understand it he should have sought advice. If he has acted pursuant to popular impression that title to public land may be acquired by a mere semblance of the performance of the conditions required by law to be performed he is the victim of an erroneous idea. In any event we have

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only to expound the law as we find it—the consequences of our decision we cannot help.

The decree appealed from is reversed and set aside. A decree in conformity with this opinion will be entered in this court on presentation.

Arthur G. Smith, Deputy Attorney General (Alexander Lindsay, Jr., Attorney General, with him on the brief), for appellant.

Harry Irwin for appellee.

CHARLES LUCAS, JOHN LUCAS AND MARY N. LUCAS, COPARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF LUCAS BROTHERS, *v.* MELLIE E. HUSTACE AND J. R. DAVIS.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED APRIL 29, 1912.

DECIDED MAY 7, 1912.

ROBERTSON, C. J., PERRY AND DE BOLT, JJ.

MECHANICS' LIENS—*completion of building.*

The statutory period for the filing of liens of mechanics and materialmen commences to run only from the final completion of the structure. When labor and material required by the terms of a contract for the erection of a building are not furnished in the first instance and are subsequently supplied by the contractor at the request of the owner, the latter refusing to accept the building as at first tendered, the final completion of the structure, within the meaning of section 2174, R. L., as amended by Act 97 of the Laws of 1909, dates from the time the omissions are so supplied, even though in the meantime the owner takes possession of the property.

OPINION OF THE COURT BY PERRY, J.

This is an action of assumpsit and for enforcement of a lien in favor of the plaintiffs as mechanics and materialmen, the

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defendant Mellie E. Hustace being the owner of the building and the defendant Davis being the contractor who erected it. The circuit court without a jury rendered judgment for the plaintiffs for the full amount claimed and for foreclosure of the lien. The only question presented under the bill of exceptions is whether the notice of lien was filed within the time allowed by law, the provision of the statute being in this respect that "the lien shall continue for forty-five days, and no longer, after the completion of the construction * * * of the building * * * against which it shall have been filed, unless the same shall have been satisfied, or proceedings commenced to collect the amount due thereon by enforcing the same." R. L., Sec. 2174, as amended by Act 97 of the Laws of 1909. The lien was filed and served on June 2, 1911. Concerning the date of the completion of the building the trial court made the following finding of facts: "The house was substantially completed some time between March 15 and March 20, 1911, at which time the contractor removed his men, tools and equipment from the building and offered to hand the same over to the owner. In certain minor details, however, the owner considered that the contract had not been completed and refused to accept the building until such minor matters were completed according to her understanding of the contract. After a considerable wordy dispute between the contractor and the owner the former agreed to make certain of the necessary alterations and for such purpose employed the plaintiffs herein to perform certain labor. This labor was performed during the week ending April 19, 1911, and amounted to \$31.20." We understand this finding to be that the building was completed between March 15 and March 20 except in respect to the "minor matters" referred to. The evidence amply supports the finding. The "minor matters", as shown by the undisputed evidence, included the easing of certain doors and the furnishing and placing of certain shelving in the kitchen

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and in the pantry. It further appeared from undisputed evidence that on or about March 20 the owner furnished and occupied the building and that on that date the contractor claimed that the contract had been fully performed by him and removed his men and implements from the premises. The lien claimed was for the sum of \$412.76, including charges for labor and material furnished prior to March 20, 1911, as well as the \$31.20 above mentioned.

The owner's contention is that the time for the filing of the lien commenced to run on March 20, the date of the "substantial completion" of the building. The rule invoked does not apply in the case at bar. In most if not all of the cases cited in support of the contention the facts and the statutory provisions differed from those in this case. In some there was a statutory provision that "occupation or use of the building * * * by the owner * * * shall be deemed conclusive evidence of completion." See, for example, *McLaughlin v. Perkins*, 102 Cal. 502. In others the provision was, "cessation from labor for thirty days upon any unfinished contract * * * shall be deemed to be equivalent to a completion thereof for all the purposes of this chapter." *Johnson v. La Grave*, 102 Cal. 324. In *Chicago Lumber Co. v. Merrimac River Savings Bank*, 52 Kan. 410, the statute declared that abandonment of the work should, for the purposes of protecting the rights of materialmen, be deemed to be the completion of the building. Under the statute in another case "any trivial imperfection in * * * the construction of any building" was not to be "deemed such a lack of completion as to prevent the filing of any lien." *Lumber Co. v. Williams*, 31 Pac. (Cal.) 1128. It is obvious that the reasoning in cases in any of these classes is inapplicable in the present case in the absence of similar statutory provisions.

When a building is completed within the meaning of the statute is a question to be determined in view of the circum-

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stances of each case. Perhaps it is to be deemed complete upon its acceptance by the owner as complete even though not all of the specifications have been complied with or upon abandonment by the contractor when the building is substantially but not entirely completed and the owner takes no steps to complete it. However that may be, when, as in the case at bar, the statute simply declares that the lien shall continue for a stated time and no longer "after the completion of the construction of the building" and the owner refuses to accept the building as first tendered by the contractor on the ground that it has not been completed according to the specifications and thereafter, the owner still insisting that it is required by the specifications, the contractor performs the additional labor or furnishes the material for the purpose of complying with his duty under the specifications to complete the building as thereby agreed to be erected, all of the material and labor is furnished as part of one and the same continuing contract, the building is not completed until the final additions are made and the statutory period for the filing of liens does not commence to run until then even though the additions and alterations are of comparatively slight value. "When work demanded by the terms of the original contract has been omitted, the final completion of the structure dates from the time such omissions are supplied by the builder at the request of the owner, although in the meantime the latter may have taken possession of the property * * *; the rule seeming to be that while there is anything to do which it is the duty of the builder to perform, under the terms of the contract, the work upon which he is engaged is not completed until this obligation is accomplished. * * *

When the work has been apparently completed, but not accepted, the restoration by the builder of a part to which objection has been made is considered as a substitution under the terms of the original agreement, and not a repair, and therefore the statute begins to run only from the final completion of the

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imperfectly formed obligation." *Avery v. Butler*, 47. Pac. (Ore.) 706, 708. To the same effect are *Stidger v. McPhee*, 62 Pac. (Colo.) 332 and *National Stockyards v. O'Reilly*, 85 Ill, 546, 554. In the case at bar doors properly hung and fitted and the shelving in the pantry and the kitchen were essential parts of the building under the terms of the contract. It is clear from the undisputed evidence that at no time prior to April 19, the day upon which the alterations and additions were completed, was there an acceptance of the building by the owner even though the latter occupied the building in the latter part of March or early in April. The language of our statute is plain and unambiguous. The completion of the building marks the commencement of the period of limitations and in this case that event did not take place until April 19. The notice of lien was therefore filed within the prescribed period.

The exceptions are overruled.

W. B. Lymer (*Thompson, Wilder, Watson & Lymer* on the brief) for plaintiffs.

J. A. Magoon and *N. W. Ahuli* for defendant Mellie E. Hustace.

SAMUEL M. KANAKANUI, TRUSTEE, AND YEE WO
v. EMMA A. DE FRIES.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED APRIL 29, 1912.

DECIDED MAY 7, 1912.

ROBERTSON, C. J., PERRY AND DE BOLT, JJ.

LANDLORD AND TENANT—*relief in equity against forfeiture of lease.*

Equity will relieve against the forfeiture of a lease for the lessee's failure to pay taxes where such failure was not due to gross negligence and was not persistent and wilful. Where the

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lessee has been lulled into non-action by equivocal conduct on the part of the lessor the failure to pay the taxes may be regarded as not wilful and persistent.

OPINION OF THE COURT BY ROBERTSON, C. J.

In a bill for an injunction to restrain the respondent from prosecuting an action of ejectment for the recovery of two pieces of land situate at Waikiki, Honolulu, the complainants alleged that on April 12, 1906, the complainant, S. M. Kananui, Trustee, leased the land in question from one Wakeki Heleluhi for the term of twenty years from July 1, 1906, in consideration of the payment of five hundred dollars rental, in advance, for the whole term, the lessee covenanting to pay the taxes; that Kananui, on June 6, 1906, leased one of the pieces to the complainant Yee Wo for the whole of said twenty-year term; that thereafter, but prior to August 20, 1907, Kananui endeavored without success to obtain possession of the other of said pieces of land, it being in the possession of a third party who denied the complainants' right thereto; that a few days thereafter Kananui told Wakeki Heleluhi of this and asked her to put him in possession of that piece, but she replied that she could not do so; that in the early part of the year 1907, Wakeki Heleluhi asked Kananui why he did not pay the taxes, to which he replied that as he had not been put into possession of all the land he considered that he was not liable for the taxes and that he would not pay them until he should be put into possession, and that Wakeki Heleluhi replied, "all right;" that on July 1, 1911, Wakeki Heleluhi sold and conveyed the premises demised as aforesaid to Kananui to the respondent in this case; that sometime prior to August 29, 1911, a notice dated July 24, 1911, was posted on the premises held by Yee Wo, signed by the respondent and two witnesses, declaring that, because of the non-payment of the taxes in accordance with the terms of the lease of April 12, 1906, re-entry was made upon the premises and the lease declared

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forfeited and cancelled pursuant to the provisions therefor contained in said lease; that no such notice was served upon the complainants; that subsequent to said purported re-entry but prior to August 29, 1911, the respondent's attorney made demand on Kanakanui for payment of the taxes, and that complainant said that he was ready to pay the same, but did not know the exact amount, requested the attorney to furnish him with a statement of same, and that the attorney promised to furnish such statement but never did so; that after said demand but prior to August 29, 1911, Kanakanui tendered to the respondent the amount of all taxes due on said premises with penalties and interest thereon, amounting to \$113.25, but respondent refused to accept the same; that complainants have always been able and ready and now offer to pay all sums for which they or either of them are equitably liable for taxes and expenses; that the complainants refrained from paying the taxes relying on the agreement between Wakeki Heleluhi and Kanakanui that the latter should not pay the same until he was placed in possession of all the land demised to him; that on August 29, 1911, the respondent brought a proceeding for the summary possession of the premises demised by the lease of April 12, 1906, and obtained judgment which was reversed by this court (20 Haw. 712) and the action was afterwards discontinued; and that on January 10, 1912, the respondent instituted an action of ejectment to recover the possession of said premises.

The respondent demurred to the bill on the grounds that the complainants have an adequate remedy at law, and that there is no equity in the bill. The demurrer was sustained, and the bill dismissed.

The complainants base their claim to relief upon two grounds. The first is that the respondent's grantor, by her conduct, waived the right to require the payment of the taxes and estopped herself from claiming a forfeiture of the term

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because of the failure to pay them, and, hence, that the respondent also is so estopped. It is in connection with this ground that the respondent contends the complainants have a full and complete remedy at law. In this jurisdiction equitable estoppels are recognized and enforced in actions at law, and we assume that the estoppel or waiver which is claimed by the complainants to have resulted from the conversation between Kanakanui and Wakeki Heleluhi, and the alleged agreement of the latter to waive the taxes, would be as available to the complainants in the ejectment case as in this. If there were nothing else in the case we should have to affirm the decree.

Complainants' second ground is that, aside from any question of waiver or estoppel, the bill states a case which entitles them to relief from the forfeiture upon well settled principles of equity. The respondent's reply to this contention, and her ground of demurrer to this aspect of the bill, is that it appears from the bill itself that the failure to pay the taxes has been so wilful and persistent that the complainants are not entitled to the interposition of equity to save them from the forfeiture. It is upon this point that the case turns.

The jurisdiction of courts of equity to relieve tenants from the forfeiture of their estates by reason of the non-payment of rent when due is thoroughly established and has long been recognized in this jurisdiction. *Wirt v. Phillips*, 1 Haw. 61; *Garrett v. Macfarlane*, 6 Haw. 435; *Henrique v. Paris*, 10 Haw. 408. The law on the subject was well stated in the case last cited as follows: "Courts of equity regard the performance of covenants in leases as the real object desired, and the right of entry as mere security for such performance, and so they do not always hold parties strictly to their legal rights, but often relieve against a forfeiture, especially if full and exact compensation can be made to the injured party. Accordingly, in case of a breach of a covenant to pay rent, relief is generally granted against a forfeiture, because payment of the

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rent with interest thereon is deemed full and exact compensation. But in the case of other covenants, as to repair, insure, clear off lantana, etc., relief will not generally, except in cases of fraud, mistake, accident or surprise, be granted, because the exact compensation cannot be ascertained. And even in cases where exact compensation can be made relief will not be granted if the breach is due to gross negligence or is persistent and wilful on the part of the lessee." 10 Haw. 411. In regard to taxes, it has been decided that the payment of taxes may be made a condition of forfeiture of a term, and that it is not necessary for the lessor to first pay them or to demand that the lessee pay them before insisting on the forfeiture accruing from their non-payment. *Cornavell v. Colburn*, 15 Haw. 632. Also, it has been decided, that equity will relieve against such a forfeiture, upon the same principle as in the case of the non-payment of rent. *Lau Dan v. Ah Leong*, 19 Haw. 417. In that case the complainants sought and obtained an injunction to restrain the defendant from proceeding with an action at law wherein he sought to establish title to land, the plaintiff's claim being based on an alleged forfeiture of a lease held by the complainants for non-payment of taxes. It was held that the complainants were entitled to be relieved from the forfeiture upon their paying the amount of the taxes with interest and costs and the defendant's attorney's fees. That case is authority for the sustaining of the bill in the case at bar unless the difference in the facts and circumstances require a different conclusion. The complainants may be entitled to equitable relief regardless of the question of estoppel. The question is whether, upon the facts alleged in the bill, it appears that the default of the complainants has been so persistent and wilful that they are not in a position to invoke the aid of equity. At first blush it would seem that so long a time had elapsed since the default first occurred that it ought to be so regarded. On the other hand the allegations show that there were several circumstances

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of extenuation. The failure and inability of the lessor to put the lessee into possession of one of the pieces of land demised gave to the lessee a claim against the lessor which, presumably, would amount to an equivalent of several years taxes on the piece that the lessee was put into possession of. The lessor took no steps toward claiming a forfeiture though she was told by the lessee that he considered he was not required to pay the taxes unless he should be put into possession of all the land. This condition continued for four years or more. The lessee was lulled into non-action. Things remained in *statu quo* until after July 1, 1911, when the respondent purchased the reversion. On July 24th re-entry was made, but following that the respondent's attorney demanded of the lessee payment of the taxes and upon being informed that the lessee was ready to make payment but did not know what amount was due, he promised to furnish a statement of the amount, though he did not do so. Thereafter the lessee made a tender of the amount to the respondent, evidently having ascertained the amount in the meantime. The tender was refused and suit brought upon the forfeiture on August 29, 1911. The action which it is now sought to restrain was instituted in January of the present year, four months or more after the lessee had made tender of the amount of taxes plus penalties and interest. The respondent can now be made whole by the payment of money. And it is proper to take into consideration the fact that upon obtaining the lease the lessee paid the rent in advance for the full term of the demise. Under all the circumstances, we think the lessee's failure to pay the taxes was not "persistent and wilful" within the meaning of the rule and that the bill states a case for equitable relief. The demurrer should be overruled.

The decree appealed from is reversed and the case remanded to the circuit judge.

W. A. Greenwell (*Castle & Withington* on the brief) for complainants.

Lorin Andrews for respondent.

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M. J. R. e SILVA v. EWA PLANTATION COMPANY,
A CORPORATION.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED MAY 6, 1912.

DECIDED MAY 20, 1912.

PERRY AND DE BOLT, JJ., AND CIRCUIT JUDGE ROBINSON
IN PLACE OF ROBERTSON, C. J.

MASTER AND SERVANT—*fellow servants—negligence.*

The general rule of law is that one who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow servants in the course of the employment.

An employer is not liable for an injury to one employee occasioned by the negligence of another engaged in the same general undertaking; it is not necessary that the servants should be engaged in the same operation or particular work; it is enough, to bring the case within the general rule of exemption, if they are in the employment of the same master, engaged in the same common enterprise, both employed to perform duties tending to accomplish the same general purposes, or, in other words, if the services of each in his particular sphere or department are directed to the accomplishment of the same general end; and accordingly in the present case, upon the facts stated, the injured carpenter and those operating the train are to be considered fellow servants within the rule.

A servant is deemed in law to have contemplated the possibility of accidents due to the negligence of his fellow servants with whom he comes in contact in the course of the performance of his duties.

OPINION OF THE COURT BY PERRY, J.

This is an action to recover for personal injuries resulting from the alleged negligence of the defendant. The exception is to an order sustaining the demurrer to the amended declaration on the ground that it does not state a cause of action. The essential allegations of the declaration are that "on the 18th day of November, A. D. 1910, and during all the times hereinafter mentioned defendant was a sugar plantation corporation having a large number of employees engaged in different

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and several departments of service of which two were, respectively, the carpenter and the transportation department, each so separated from the other that the scope of employment of the employees of one department did not include the possibility of coming in contact with and incurring danger from the negligent performance of the duties of service by the employees of the other department; that neither upon the beginning of plaintiff's employment by and for defendant, nor thereafter while so employed, nor upon the 18th day of November, A. D. 1910, were the possibility of plaintiff in the performance of his duties as a carpenter coming in contact with the employees of defendant operating trains upon the lands of defendant and incurring danger from the negligent performance by such employees of defendant operating such trains of their duties in respect thereof, contemplated by plaintiff or defendant;" that on the 18th day of November, 1910, "while engaged in his duties as such carpenter and riding upon a railroad automobile of defendant over and upon the tracks of the defendant company, on its lands at Ewa aforesaid, and particularly about 200 feet easterly of a certain pump of defendant known as pump No. 5, said defendant by its agents and servants then employed in the transportation department of defendant, so carelessly, negligently and recklessly operated a train consisting of locomotive and cane cars over and upon the tracks of said defendant and upon which said railroad automobile was then and there proceeding, that this plaintiff by said locomotive and cane cars, without any fault or negligence on his part was * * * precipitated to the ground," causing the injuries complained of.

It is settled that the common law rule that a servant injured by the negligence of a fellow servant has no remedy against the common employer is law in this jurisdiction. *Mejea v. Whitehouse*, 19 Haw. 159, 160; *Campbell v. Hackfeld*, 20 Haw. 33, 35. It is also settled that there are certain limitations to this general rule. One of them is that a master owes to a

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servant the duty of providing reasonably safe tools, appliances and machinery for the accomplishment of the work. Another is that it is an obligation of the employer to provide a safe place for his employees to work in. Still another limitation, recognized in other jurisdictions and perhaps not definitely considered in this, is that it is the duty of the master to employ reasonably careful and competent workmen and that for a breach of this duty he is liable to an injured fellow servant. *Mejea v. Whitehouse* and *Campbell v. Hackfeld*, *supra*. These are often referred to as positive duties of the master to his servants and as to them the rule is that "if instead of personally performing these obligations the master engages another to do them for him he is liable for the neglect of that other, which, in such case, is not the neglect of a fellow servant no matter what his position as to other matters, but is the neglect of the master to do those things which it is the duty of the master to perform as such," the question of liability turning rather on the character of the act than on the relations of the employees to each other. *Railroad v. Peterson*, 162 U. S. 346. In the latter class of cases the servant performing the master's duty is sometimes called a vice-principal, irrespective of the position ordinarily occupied by him in the master's service. The further limitation attempted in some jurisdictions, that when the servant whose negligence causes the injury is a sub-manager or foreman of higher grade or greater authority than the plaintiff such servant is a vice-principal and the employer is liable, is rejected in the majority of American jurisdictions and in Hawaii. *Mejea v. Whitehouse*, *supra*.

A clear statement of the law is that in *Railroad v. Conroy*, 175 U. S. 323, 328, where the court said that it had no hesitation in holding, both upon principle and authority, "that the employer is not liable for an injury to one employee occasioned by the negligence of another engaged in the same general undertaking; that it is not necessary that the servants should be engaged in the same operation or particular work, that it

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is enough, to bring the case within the general rule of exemption, if they are in the employment of the same master, engaged in the same common enterprise, both employed to perform duties tending to accomplish the same general purposes, or, in other words, if the services of each in his particular sphere or department are directed to the accomplishment of the same general end." In the case at bar the declaration shows beyond doubt that at the time of the accident the plaintiff was in the employ of the defendant and that those operating the train were likewise servants of the defendant. All were in the employ of the same master, engaged in the same common enterprise, that of growing cane and manufacturing sugar, and were employed to perform duties tending to accomplish the same general purposes. The services of each in his particular sphere or "department" were directed to the accomplishment of the same general end. Prima facie they were fellow servants within the rule. "The general rule is that those entering into the service of a common master become thereby engaged in a common service and fellow servants and prima facie the common master is not liable for the negligence of one of his servants which has resulted in an injury to a fellow servant." *Campbell v. Hackfeld*, quoting from *Railroad v. Peterson*, supra. See also *Randall v. Railroad*, 109 U. S. 478; *Railroad v. Baugh*, 149 U. S. 368; *Railroad v. Keegan*, 160 U. S. 259; *Railroad v. Dixon*, 194 U. S. 338. The limitation concerning vice-principals is not invoked by the plaintiff and obviously has no application. None of the positive duties of the master is shown to have been violated. There is no allegation, direct or indirect, of failure to provide a reasonably safe place to work in or reasonably safe machinery or other appliances or reasonably careful and competent men to operate the train. It is alleged that the negligence was that of the "agents and servants" of the defendant, but whether it was that of the engineer, the fireman, or brakeman or of some other servant is not disclosed. So also the plaintiff does not rely upon the doctrine

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that the mere fact that the two servants are engaged in separate and distinct "departments" of the employer's business determines favorably to the plaintiff the question of the defendant's liability—a doctrine which has been specifically disavowed by the supreme court of the United States. *Quebec S. S. Co. v. Merchant*, 133 U. S. 375; *Railroad v. Hambly*, 154 U. S. 349; *Railroad v. Conroy*, supra.

The sole contention is that the rule of exemption of liability is based on the theory that the servant in entering the service assumes the risks of injury caused by the negligence of other servants; that the servant assumes those risks when they are "incident to negligence of servants with whom there is a possibility of contact"; that "it is only when from all the facts and circumstances of the case it can be said that the contract of employment contemplated possibility of contact with servants that the assumption of risk applies to such servants, not as to others with whom there is no possibility of contact;" that "the existence of 'departments' is but one item of many to be considered in determining whether there was possibility of contact" and that the declaration contains an express allegation to the effect that the possibility of contact was not contemplated by the parties. In support of this contention the plaintiff relies largely upon the statement in *Railroad v. Hambly*, 154 U. S. 349, 357, that "If the departments of the two servants are so far separated from each other that the possibility of coming in contact and hence of incurring danger from the negligent performance of the duties of such department could not be said to be within the contemplation of the person injured the doctrine of fellow servants should not apply." See also *Bridge Co. v. Miller*, 71 Kan. 13, 40, 41, where it was said, inter alia, that "if the process" of organization "proceeds so far that different departments become in effect distinct enterprises each one may be treated as a separate undertaking. The danger of injury from employees so completely disconnected is so remote that it may fairly be said to be excluded from the contemplation

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of the parties when the contract is made." It may be assumed for the purposes of this case that the law is as stated in the two cases just cited. Whether in a given case it was within the contemplation of the parties that the servant should assume certain risks is a mixed question of law and fact. In the case at bar the allegation "that neither upon the beginning of plaintiff's employment" nor at any time thereafter "were the possibility of plaintiff in the performance of his duties as a carpenter coming in contact with the employees of the defendant operating trains upon the lands of defendant and incurring danger from the negligent performance of such employees operating such trains of their duties in respect thereof, contemplated by plaintiff or defendant" involves a conclusion of law and that conclusion, as well as any conclusion of fact which it may include, and the allegation that "the carpenter and the transportation department were so separated from each other that the scope of employment of the employee of one department did not include the possibility of coming in contact with or incurring danger from the negligent performance of the duties of service by the employees of the other department" are negatived by the subsequent allegations that on the day named "while engaged in his duties as such carpenter and riding upon a railroad automobile of defendant over and upon the tracks of the defendant company * * * said defendant by its agents and servants, then employed in the transportation department of defendant, so carelessly, negligently and recklessly operated the train, consisting of locomotive and cane cars, over and upon the tracks of said defendant upon which said railroad automobile was then and there proceeding, that this plaintiff by said locomotive and cane cars" was hurled to the ground. It is clear from the later allegations that the plaintiff while in the automobile on the track was in the discharge of his duties, and the language used, taken in its ordinary acceptation, leads to the conclusion that those operating the train were likewise doing so in the discharge of their duty and were rightfully on the

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track referred to. The probability of coming in collision with a railroad train by reason of the negligence of the engineer, conductor or other operator of the train is greatest to one who is traveling upon or in close proximity to a railroad track. Common knowledge and experience teach this and the plaintiff in undertaking duties which involved his riding in the automobile on the track should have contemplated the possibility of accidents of the general nature of the one complained of. Whether or not in fact the possibility occurred to him, in law he must be deemed to have contemplated it. See, for example, *Bridge Co. v. Miller*, *Railroad v. Baugh* and *Railroad v. Hambly*, *supra*.

Counsel for the plaintiff suggests that it may be that the train was not rightfully on the track upon which plaintiff's automobile was proceeding. The inference from the allegations as made is to the contrary. If the fact was as suggested the plaintiff should have included an allegation to that effect; but we do not intimate that that fact of itself would render the employer liable or the declaration sufficient.

Upon the allegations of the declaration the accident was not due to the violation of any positive duty of the employer towards the plaintiff but was caused solely by the negligence of one or more of his fellow servants in the operation of the train. The demurrer was correctly sustained.

The exception is overruled and the cause is remanded for such further proceedings as may be appropriate.

E. C. Peters for plaintiff.

D. L. Withington (*Castle & Withington* on the brief) for defendant.

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HONOLULU RAPID TRANSIT & LAND COMPANY v.
THE TERRITORY OF HAWAII AND MARSTON
CAMPBELL, SUPERINTENDENT OF PUBLIC
WORKS.

SUBMISSION UPON AGREED STATEMENT OF FACTS.

ARGUED MAY 13, 1912.

DECIDED MAY 24, 1912.

ROBERTSON, C. J. PERRY AND DE BOLT, JJ.

STREET RAILROADS—*obligation to pave street.*

The duty imposed on the street railway company by section 838, R. L., to pave or macadamize the portions of the streets occupied by its tracks whenever the other portions of the streets are paved or macadamized is not limited to original construction, but requires the company to lay a pavement corresponding with a new pavement laid down by the proper governmental authority though the portion of the street occupied by the company had previously been macadamized.

SAME—*obligation to conform to street improvements.*

Under section 864, R. L., the duty is imposed on the street railway company to pave its portion of the street so as to conform to a new pavement laid down on the rest of the street by the city and county of Honolulu, whether the duty is enjoined by section 838, R. L., or not. The word "Territory" as used in section 864, is equivalent to "Government" and includes street improvements made by the municipality.

SAME—*discretion of superintendent of public works as to directing kind of pavement.*

The obligation of the street railway company as to paving is defined and fixed by the franchise act. The superintendent of public works has no discretion to authorize or direct the laying of a pavement of a kind different from that used by the government.

SAME—*necessity for repaving streets.*

The necessity for repaving the streets is to be determined by the governmental authorities having charge of such work. And in prescribing the kind of pavement to be used the authorities are not limited to that which was in ordinary use at the time of the granting of the franchise.

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SAME—reasonableness of requirement to repave street.

Notice to the railway company that it shall conform to a patented bitulithic pavement laid upon a concrete foundation put down on a certain section of King street, in Honolulu, by the municipal authorities does not constitute an unreasonable requirement, it not appearing that the cost would be excessive or that the owner of the patent contemplated exacting conditions other than payment of the price of the material and the cost of laying the pavement, and no claim being made that the pavement was not an approved one, or that the action of the municipality in laying it was in any way improper or inappropriate, though nearly one-half of the life of the franchise has expired, and at the end of the term of the franchise the ties could be taken up only with much difficulty.

OPINION OF THE COURT BY ROBERTSON, C. J.

The facts agreed upon by the parties are as follows:

"The Honolulu Rapid Transit & Land Company is a corporation, duly organized and existing under the laws of the Territory of Hawaii and incorporated under the provisions of the Act of July 7, A. D. 1898, to hold, and is holding and exercising, the franchise and privileges granted in said Act, and has constructed and is maintaining and operating a street railway in Honolulu, in said Territory of Hawaii; said franchise having been ratified subject to the approval of the President under the provisions of the Organic Act creating the Territory of Hawaii, and said franchise, incorporation, and all acts done and proceedings taken in the premises having been duly approved by the President of the United States on the 25th day of June, 1900, in accordance with Section 73 of said Organic Act.

"That prior to the 15th day of February, 1911, the Honolulu Rapid Transit & Land Company had been maintaining and operating upon that portion of King Street between the bridge over the Nuuanu Stream and Nuuanu Street, in said City and County of Honolulu, a distance of about 1212 feet, a single track railway, and, at said time, said portion of King Street had been improved and macadamized, and, in accordance with Section 4, paragraph 5, of said Act of July 7, 1898, the said corporation had macadamized the space between its tracks and

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for one foot outside of its rails upon said portion of said street, in conformity with law.

"That since said 15th day of February, 1911, the said Company, having acquired the lawful right so to do, has operated and is now operating a double track upon said portion of King Street, which it constructed, and has resurfaced with macadam the entire space between the outside rails of said double track and for one foot outside of said outside rails corresponding with the macadamizing of the remaining portion of said street, said additional track having been constructed upon a location approved, in writing, by the Superintendent of Public Works.

"That thereafter, to wit, on or about the 8th day of December, 1911, by proceedings duly had in accordance with law, the City and County of Honolulu entered into a contract with the Bitulithic Paving & Concrete Company, Limited, to pave with bitulithic pavement of two inches in depth upon a concrete foundation, that portion of King Street between the Bridge over the Nuuanu Stream and Nuuanu Street, said improvement being of a permanent and lasting character, the only portion of the same requiring replacement being about two inches of surfacing which the Bitulithic Paving & Concrete Company, Limited, guaranteed to keep in repair for the period of five years.

"That the said bitulithic pavement is a patented article of which the Bitulithic Paving & Concrete Company, Limited, have the exclusive control and the right to use the same within the Territory of Hawaii, and will have such exclusive control and the right to use the same for the life of the patent, which is for about ten years.

"That upon the 5th day of March, 1912, the said Bitulithic Paving & Concrete Company, Limited, completed the paving of said street in accordance with the above mentioned contract.

"That after said contract was entered into, to wit, on or about the 6th day of January, 1912, the said Superintendent of Public Works gave notice to the Honolulu Rapid Transit & Land Company (a copy of which is hereto annexed and made a part hereof) to improve its portion of the street with the same material as specified in said contract between the City and County of Honolulu and the Bitulithic Paving & Concrete Company, Limited, except that there shall be on each side of said rails wooden or stone blocks.

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"That the rails of the said Honolulu Rapid Transit & Land Company on said portion of King street have a depth of seven inches when set in the street, and that the life of such a rail is about ten to fourteen years; and that the rails in the old track on said portion of King Street have on the average about twenty-five per cent of the life of the rails yet remaining.

"That in paving with bitulithic or other kinds of paving requiring a permanent concrete base or foundation, it is necessary that the concrete base should (except where stone or wooden blocks are laid on each side of the rails) extend up to within two inches of the top of the rail; that the method prescribed in the notice of the Superintendent of Public Works is one of the adopted methods of construction used by street railways where bitulithic, asphaltic, bituminous, tarvia or other similar pavements are used; that the purpose of the wooden or stone blocks on each side of the rail, and, in this instance, of a depth of not less than six inches, is to allow the rail to be renewed or removed without damage to the balance of the pavement.

"That another adopted method of construction by street railroads, where similar pavements are used, is the use of wooden or stone blocks for the entire space between the rails and for one foot on each side of the rails for a depth substantially equal to the rail and with only one inch of cement mortar over the ties.

"That the Honolulu Rapid Transit & Land Company requested the Superintendent of Public Works to allow them, in case they are compelled to pave as required, to use the latter form.

"That under the first above mentioned method of construction, the use of wooden or stone blocks next to the rail is for the purpose of dissipating vibration, of permitting the renewal of the rails without damage to the portion of the pavement constructed by the City and County, and that under the last above mentioned method of construction, the use of such blocks for the entire space between the rails is for the same purposes, and the further and main purpose of allowing the renewal of the ties without destroying the concrete and bitulithic pavement between the rails that would be necessitated if the first above method of construction should be adopted.

"That the cost of the improvement under either of said methods would be about the sum of Nine Thousand Dollars

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(\$9000) and under either of said methods, if adopted, it would be the part of good, sound engineering judgment for the Honolulu Rapid Transit & Land Company to replace with new ties and rails such ties and rails as the life of which is well spent."

The notice served on the company by the superintendent of public works was as follows:

"Jan. 6, 1913.

"Gentlemen:

The City and County of Honolulu has let a contract for the paving of King Street, from River Street to Nuuanu Avenue; and you are hereby notified, in accordance with the law applicable thereto, as set forth in Chapter 66 of the Revised Laws of Hawaii, to pave the portion of the street occupied by your tracks, and one foot outside of the outside rail, between River Street and Nuuanu Avenue, with the same materials as specified in that certain contract made by the City and County of Honolulu for the paving of King Street, from River Street to Nuuanu Avenue, except that there shall be on each side of each rail throughout its length rows of either ohia or stone blocks not to exceed one foot in width. The blocks to be grouted in position with an approved grout, in accordance with Standard Plan for this type of construction on file in the office of the Superintendent of Public Works, a copy of which is attached hereto.

"Very truly yours,

MARSTON CAMPBELL,

Superintendent of Public Works.

"Honolulu Rapid Transit & Land Co.

"Honolulu."

The following questions have arisen and are now submitted for adjudication:

"(1) Does the action of the municipal authorities of the City and County of Honolulu in the premises create any obligation on the part of the Honolulu Rapid Transit & Land Company which can be enforced under Section 29 of said Act (Section 838 Revised Laws of Hawaii) ?

"(2) Has the Superintendent of Public Works discretion as to the kind of paving he shall direct the Honolulu Rapid Transit & Land Company to make in the premises? May he direct that other kinds of pavement than used by the City and

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County of Honolulu on said street, be laid by the Honolulu Rapid Transit and Land Company?

"(3) Has the Honolulu Rapid Transit & Land Company, by macadamizing as set forth, the portion of King Street referred to, complied with the obligation of its charter and the law to pave or macadamize as set forth in Section 4 of the Act of July 7, 1898 (Section 838 Revised Laws of Hawaii) so as to free it of any or all obligation to pave said portion of said street in the manner directed by the Superintendent of Public Works or in the manner in which the remaining portion of said street has been paved by the City and County of Honolulu?

"(4) Is it a reasonable requirement under the provisions of its Charter and the law that the Honolulu Rapid Transit & Land Company should be required to lay a paving of the kind aforesaid under the conditions herein set forth?

"(5) Is it a reasonable requirement, under the provisions of its Charter and the law that the Honolulu Rapid Transit & Land Company should be required to lay a paving of a patented material, which they are obliged to maintain, and the furnishing of which is entirely under the control of the owner of the patent?

"(6) In view of the foregoing facts and the law as set forth in Chapter 66 of the Revised Laws and more particularly in Sections 838 and 864 of said Chapter, is the Honolulu Rapid Transit & Land Company obliged to pave the entire space between the outside rails of its said tracks on King Street between the bridge over the Nuuanu Stream and Nuuanu Street, so that such paving shall be flush with said street and correspond in material with the paving of the remaining portion of said street?

"(7) In view of said facts and law, is the Honolulu Rapid Transit & Land Company obliged to comply with said notice of said Superintendent of Public Works?"

On behalf of the railway company it is contended that as the franchise act is a contract which cannot be changed without the consent of the company, and as all powers in reference to street improvements were vested by the statute in the superintendent of public works, and the Territory, a new obligation to comply with the action of the municipal authorities cannot be

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imposed; that whatever discretion the superintendent of public works had before the passage of the municipal act (Act 118, Laws of 1907) he has still, and he is not compelled to direct the company to lay a pavement of the kind used by the municipality; that the company, having macadamized that portion of the street occupied by it at a time when the rest of the street was macadamized, the obligation in reference to original construction contained in section 838 of the Revised Laws was fulfilled, and there was no obligation on the company to repave; that the provision contained in section 864 of the Revised Laws in regard to conforming to street improvements refers only to improvements made by the Territory, and does not apply to an improvement by the municipality; that the requirement to put down a pavement of the permanent and expensive character referred to is unreasonable because nearly one-half of the life of the franchise has run, and the character of the required pavement is such as to prevent the removal, at the end of the franchise, of the ties; and that the requirement is unreasonable and illegal because it compels the company to use a patented article.

Paragraph 9 of section 838, R. L., provides that "whenever the streets are paved or macadamized" the company shall pave or macadamize the entire space between its tracks, or between the outside rails of double tracks if more than one track be laid, and for one foot outside of the outer rails, and such paving or macadamizing shall be flush with the streets, and correspond with the paving or macadamizing of the remaining portion of the street. Also that the company shall keep its tracks, and its portions of all the streets, "in good repair," such repair when made to be approved by the superintendent of public works.

Paragraph 3 of section 864, R. L., provides that the company's tracks shall conform to the grades of the streets on which they are laid down, and that "in all cases of street improvements by the Territory," the company "shall conform to all such improvements, in the kind of pavement and the manner

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of laying the same, as directed by the superintendent of public works."

The duty imposed upon the company by section 838 is not only to keep the portion of the streets occupied by its tracks in good repair, but also to pave or macadamize whenever the streets shall be paved or macadamized. "Whenever" means "at whatever time," and the provision would seem to require the company to renew its part of the street when and as often as the rest of the street shall be renewed. The requirement that the paving done by the company shall correspond with that of the remaining portion of the street tends to strengthen this view. The evident purpose of the provision was to secure a uniformity in street construction which could be attained only by compelling the railway company to follow the methods that may be adopted from time to time by the governmental authorities. The duty to pave or macadamize must, therefore, be held to include the duty to repave or re-macadamize. This construction has been given to similar provisions by courts in other jurisdictions. *Lansing v. Lansing City El. Ry. Co.*, 109 Mich. 123; *West Chester v. West Chester Street Ry. Co.*, 203 Pa. St. 201; *Columbus v. Street Railroad Co.*, 45 Oh. St. 98. In *Conway v. Rochester*, cited with approval in *Rochester Ry. Co. v. Rochester*, 205 U. S. 245, the duty to "have and keep in permanent repair" whenever required by the proper local authorities and under their supervision, was held to include the duty to repave when ordered so to do.

The necessity for repaving the streets is to be determined by the governmental authorities having charge of such work. And in prescribing the kind of pavement to be used the authorities are not limited to that which was in ordinary use at the time of the granting of the franchise. The duty to repave is imposed with reference to probable changes and improved methods of street construction which the progress of the age may develop. *Philadelphia v. Ridge Ave. P. R. Co.*, 143 Pa. St. 444; *Detroit v. Fort Wayne etc. Ry. Co.*, 90 Mich. 646.

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The Territory expressly reserved the right to grade, sewer, pave, macadamize or otherwise improve, alter or repair the streets, in the franchise act. R. L. Sec. 864, Par. 2.

If the view we have taken of section 838 is sound the requirement of section 864, that the company shall conform in the kind of pavement and the manner of laying the same in all cases of street improvements by the Territory, is probably to be regarded as repetitious and unnecessary. But if the view of counsel for the railway company that section 838 does not require the company to repave after it has once paved or macadamized is correct, the duty to repave is to be found, if at all, only in section 864. We hold that the duty to repave, whether enjoined by section 838 or not, is imposed by section 864. The notice of the superintendent of public works that the company should conform to the street improvement made by the municipality did not constitute an attempt to impose upon the company an obligation which it did not assume when it accepted the franchise. In the original act (Act 69, Laws of 1898, Sec. 29) the word used in the section which is now section 864 of the Revised Laws, was "Government;" the provision being "And in all cases of street improvements by the Government" etc. In the revision of 1905 the word "Territory" was substituted for "Government." But we think there was no intention to alter the general sense of the provision. At the time the Revised Laws were enacted there were no municipal subdivisions in this Territory. The word "Territory" was used broadly and not in contradistinction to "county" or "city." Under section 91 of the Organic Act the Territory has the possession, use and control of the public highways, and under section 23 of the municipal act the city and county has the use of the streets of Honolulu "for any and every purpose." The street may be improved by the superintendent of public works out of funds appropriated from the territorial treasury, or under the direction of the board of supervisors out of funds

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drawn from the municipal treasury. Improvements made by the municipality, which, after all, is but an arm or instrumentality of the government of the Territory, are within the purview and intent of section 864. If the demand that the company should repave the portion of King street referred to so as to conform to the new pavement laid by the municipality could not be made under section 838, on the theory that that section relates only to original construction, it is valid and legal under section 864, which relates specifically to new improvements.

The franchise act, as already pointed out, provides that the pavement required to be laid by the company shall correspond (Sec. 838) or conform (Sec. 864) to the pavement laid down by the government. The act gives no discretion to the superintendent of public works to authorize or direct the laying of a different kind of pavement. The company's obligation is defined and fixed by the statute, and the street having been improved by the laying of a new pavement of a certain kind, the company cannot be authorized or compelled to pave its part with another kind. *Shamokin v. Shamokin Street Ry. Co.*, 178 Pa. St. 128. We do not regard the notice sent to the company that wooden or stone blocks be laid on each side of the rails for a space not exceeding one foot as a material departure from the statutory requirement. Good and sufficient reasons appear in the statement of facts for the use of such blocks. The act requires and the notice, likewise, should require of the company that the pavement on the part of the street which it is bound to pave shall, in kind and manner of laying, be in substantial conformity with that used on the rest of the street. We hold that the notice sent to the company by the superintendent of public works was in compliance with the duty of that official in the premises.

Notwithstanding what we have said in regard to the company's obligation to conform its pavements to those laid down by governmental authority, the provisions of the franchise act, as contended by counsel, must be given a reasonable con-

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struction and effect. If at any time the streets should be paved with such material or in such a manner as would clearly be inadequate or wasteful or extravagant, it might properly be held that to require the company to conform thereto would be an imposition on the company, and that it was not within the spirit and intent of the act that the company should be expected to comply under such circumstances. Counsel for the railway company contend that, in view of the fact that nearly one-half of the life of its franchise has passed, it is unreasonable to require the company to lay an expensive and so-called permanent pavement, such as bitulithic on a concrete foundation. It is not at all clear that the length of the life remaining in the franchise is to be considered in this connection. The statute requires the company to pave and repave, and to keep in repair the street surface occupied by its tracks so long as the franchise continues in force. If the character of the pavement required to be laid is not open to objection, we are inclined to think that the duty to lay it would be the same whether the remaining life of the franchise be long or short. Whether that is so or not, we are satisfied that it is not at all unreasonable to require the company to put down the pavement specified in the notice at a time when more than one-half of the life of its franchise remains intact. It is not claimed that the pavement in question is not an approved one. It is not claimed that the action of the municipality in laying such a pavement was in any way improper or inappropriate. We think the fact that at the expiration of the franchise the company's ties could be taken out of the concrete base only with much difficulty affords no sufficient reason for relieving the company of the obligation to lay the pavement.

The remaining point urged by the railway company is that the demand that it pave with a patented article is unreasonable and illegal. Counsel say that the railway company would be put absolutely at the mercy of the owner of the patent who, under the recent decision of the United States supreme court

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in the case of *Henry v. A. B. Dick Co.*, may exact other conditions than the mere price of the article as a condition of its sale. It is not contended, however, that as to the paving in question the owner of the patent purposes to exact any conditions of the railway company other than the price of the paving material and the charge for laying it. That the expense is not unreasonable is indicated by the fact that the patented pavement will cost no more than a pavement of wooden or stone blocks. That it would be possible for the owner of the patent to exact conditions from the company does not, as we think, help the company in this case in the absence of a showing that such an exaction is in contemplation. If the owner of the patent was seeking to impose conditions, or if it intended to charge the company a higher price for the pavement than it charged the municipality, or others, under similar circumstances, a different question would be presented. Cases have been cited which hold that patented paving may not be used on public highways where there are statutes which require that contracts for work on public roads may be let only upon competitive bidding. In this Territory the law is the other way. *Lord v. City and County of Honolulu*, 20 Haw. 175.

The first, fourth, fifth, sixth, and seventh questions are answered in the affirmative; the second and third in the negative.

D. L. Withington (*Castle & Withington* on the brief) for the Honolulu Rapid Transit & Land Co.

E. W. Sutton (*Alexander Lindsay, Jr., Attorney General*, with him on the brief) for the Territory and Superintendent of Public Works.

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ROSA LEE TYLER *v.* HEN WISE AND KATE MILTON,
DOING BUSINESS AS THE WISE & MILTON
MUSICAL COMEDY AND VAUDEVILLE COM-
PANY, DEFENDANTS, HONOLULU AMUSEMENT
COMPANY, LIMITED, AN HAWAIIAN CORPO-
RATION, GARNISHEE.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED MAY 22, 1912.

DECIDED MAY 31, 1912.

ROBERTSON, C. J., PERRY AND DE BOLT, JJ.

CONTRACTS—*evidence of modification.*

Where the undisputed evidence shows that W. employed T. in Chicago to perform as a singer in Honolulu for a period of twelve weeks at a stated salary, without any condition as to the theater or theaters in Honolulu at which T. was to appear, evidence that during a conversation between the parties in San Francisco, while T. was on her way to Honolulu under the contract, W. informed T. that she would appear at a theater operated by the H. A. Co. does not in itself justify a finding that the contract was thereby modified by the addition of a provision that T.'s performance would be at the theater so named.

EVIDENCE—*mere scintilla.*

A mere scintilla of evidence is insufficient to support a finding of fact.

Certain findings in this case held to be unsupported by evidence.

OPINION OF THE COURT BY PERRY, J.

This is an action of assumpsit for \$299 upon a contract to employ the plaintiff as singer in Honolulu for twelve weeks at a salary of \$35 per week, the main allegation being in brief that after the plaintiff had performed her part of the contract for a period of one week the defendants refused to permit her to complete the performance although she was ready and willing at all times to sing as required by the terms of her contract and offered to do so.

The following statement of facts is based upon undisputed evidence adduced at the trial. While at the office of one F.

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Doyle in Chicago the plaintiff on or about November 7, 1911, received a letter addressed to her by Doyle and reading as follows: "If you will communicate with Hen Wise, c/o Mrs. Weston, West Bank Bldg., San Francisco, Cal. immediately you will be able to arrange an indefinite engagement in Honolulu with him. I would suggest you wire him immediately." The plaintiff communicated by telegraph with the defendants inquiring concerning the terms of the offer and received from the defendants the following telegram: "Telegram recd sent you letter care Doyles. Kindly answer if the terms are ok, we furnish transportation to Honolulu and return give twelve weeks or longer all particulars are in letter. We sail Dec. twentieth answer letter as soon as received don't delay and will forward contracts." The letter referred to in this telegram was not received by plaintiff. On November 27 defendant Wise telegraphed to plaintiff from Fresno, California: "Everything is ok for you to join Co. I sent letter to Doyle's office I will forward transportation not later than twelfth Dec. for you to come to Frisco. There will be a letter at fosters Music store for you by Weds. or Thurs. Wire answer immediately." On December 1 the plaintiff telegraphed to the defendant Wise, "How is expenses over there am willing to go if I can make any thing if can break the jump that will help lots fix it for Dec if you can if not send ticket at once and I can make week there before going." The letter mentioned in the telegram of November 27 and dated at Fresno November 26, was received by the plaintiff and read as follows: "I sent a letter c/o Doyle for you over two weeks ago but did not get any reply. Now I would like to book you for Honolulu for our Co. for 12 weeks or more, but can not pay a big salary. I can pay you \$35 00/100 per week and transportation to and from Honolulu. Will advance you ticket from Chicago to Frisco you can pay it back at \$10 00 a week—and if you go to Australia with us I raise you to \$50 00 and transportation. 6 months in Australia then back to Manila and Honolulu

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again—practically 12 months work before you get back to America if you care to go. Now if you will accept terms I will have Bobby Price to come out on same train as he is going with me. Kindly let me hear by wire. I may fix Denver a week at \$40 00 for you to break the jump * * * by the way Bobby Price lives at 2823 La Salle. So let him know if you can come. You will have his ticket in charge.” Upon receipt of the letter of November 26 the plaintiff telegraphed her acceptance of the terms offered and after receiving from the defendants a railroad ticket to San Francisco proceeded to the latter city arriving there on or about December 18. In San Francisco she was furnished by the defendants transportation to Honolulu and sailed on the day following that of her arrival from the east, reaching Honolulu on December 26. Defendant Milton and one other of the defendants’ musical comedy company came to Honolulu on the same steamer with the plaintiff. The defendant Wise and the remaining members of the company arrived in Honolulu a few days later, and from the fifteenth to the nineteenth of January, 1912, inclusive, the plaintiff sang under her contract at a theater operated by the Honolulu Amusement Company in Honolulu. The Honolulu Amusement Company refused to permit the plaintiff to sing after January 19 and the remainder of the company after January 20, subsequently re-engaging some of the members of the company under a new arrangement. The defendants refused and failed to furnish to the plaintiff further employment as a singer after January 19 or to pay a part of the salary provided for by the contract although plaintiff was willing and offered to perform her part of the contract to its completion.

There was also evidence tending to show the precise amount claimed to be due the plaintiff as salary and the efforts made by her to secure other employment after January 19.

The trial court (without a jury) found that “the contract had for its consummation an engagement with the Honolulu

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Amusement Co. in Honolulu" and that "there was an implied understanding that the company formed by the defendants, of which the plaintiff was one, was to play for the Honolulu Amusement Co.; and that any termination of the engagement by the company was to terminate the contract between plaintiff and defendant" and gave judgment for the defendants. The sole question under the exceptions is whether there was sufficient evidence to support these findings and the judgment.

The undisputed evidence requires a finding that a contract, complete, in its terms, was entered into between the parties by telegraph and letter while the plaintiff was in Chicago and that the plaintiff undertook her railroad journey westward in partial fulfilment of that contract. The minds of the parties had met before the plaintiff left Chicago and as to the terms of that agreement there could be but one finding and that was that the defendants were to furnish the plaintiff employment as a singer in Honolulu for a period of at least twelve weeks at a salary of \$35 per week and were to furnish her transportation from San Francisco to Honolulu and return and advance to her the cost of transportation from Chicago to San Francisco, the latter amount to be repaid by her in weekly instalments of \$10 each. These terms were clear and unambiguous and constituted an absolute undertaking on the defendants' part to give the plaintiff employment in Honolulu for the period stated without any condition as to the theaters or places in Honolulu in which the plaintiff was to appear. The plaintiff did, indeed, testify, answering a question as to why she had come to Honolulu, "Because I got a message from Mr. Wise through Mr. Frank Doyle saying if I would let him hear from me at once he would give me an engagement in Honolulu for the Honolulu Amusement Co. or with them", but this evidence cannot support the findings excepted to. If the witness was attempting to state in this answer the contents of the note from Doyle the note itself conclusively shows that her memory was at fault in this respect. There is no mention of the Honolulu Amusement

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Company in the note or in the remainder of the correspondence. If, on the other hand, the testimony just quoted be regarded as sufficient to justify a finding that Doyle orally informed the plaintiff that the singing was to be for the Honolulu Amusement Company, nevertheless the finding could not be supported that Doyle's statement thereby became one of the terms of the contract for the evidence does not permit of a finding that Doyle was the agent of the defendants. His only part in the matter was to assist the defendants in getting into communication with the plaintiff. The only other testimony which can be claimed to support the findings made is the following from the direct examination of the defendant Wise: "Now, did you meet Madam Tyler in San Francisco?" "I did sir." "Did you have any conversation with her there about coming to Honolulu?" "I did sir." "What is the arrangement under which she was to come to Honolulu?" "Madam was to come down here for \$35 a week, her transportation from San Francisco to Honolulu and return, and twelve weeks; as my contract called for from eight to twelve weeks I gave madam the entire amount that my contract would call. The whole, entire amount, mind, would be twelve weeks, if I finished out with the Honolulu Amusement Company and I gave her twelve weeks or more; as the letter stated I was in communication with Australia and intending to go there as I always do every year." "Did you tell her where you were to play?" "I told her we were to play for the Honolulu Amusement Co. We both understood that, madam and I." "Did you say what theater, do you know?" "No I didn't say. I don't think I did although I had a letter from the then manager." This testimony would certainly permit the finding that the plaintiff knew before leaving San Francisco that the performances were to be for the Honolulu Amusement Company, but not the finding that the information so communicated to her was thereby made one of the terms of the contract. There was no suggestion by the witness that the parties understood in San Francisco that the terms of the agree-

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ment originally arrived at were being modified. The plaintiff would naturally have inferred that her appearances would be at some theater but that did not render the defendants' undertaking any the less absolute. We do not understand the defendants' testimony just quoted to be to the effect that the plaintiff understood in San Francisco that her employment for as long a period as twelve weeks would depend upon the success of the defendants in themselves obtaining employment with the Honolulu Amusement Company for that period of time. The qualification "if I finished out with the Honolulu Amusement Company" would seem to have been intended by the witness to refer to the defendants' contract with the Honolulu Amusement Company and not to the plaintiff's contract with the defendants. Assuming, however, that it was within the power of the trial court to construe the qualification as having been intended to refer to the plaintiff's contract with the defendants it is at best a mere scintilla of evidence and not sufficient to support a finding that the contract as originally entered into was modified to that extent in San Francisco. It is at best the mere statement of the defendant's conclusion as to what the contract was. The witness did not attempt to testify that he informed her in San Francisco or that she understood that her employment for twelve weeks was dependent upon the continuance of the defendants' contract with the amusement company for the same period or that they would be released from his obligation to pay her the agreed salary of \$35 upon the termination of his engagement by the amusement company. The terms of the original contract having been so clearly shown by undisputed evidence a finding of a modification of those terms cannot be based upon such evidence as that relied upon.

The defendants invoke the doctrine that in contracts in which the performance depends on the continued existence of a specified person or thing a condition is implied that impossibility of performance arising from the perishing or destruction of the

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person of thing shall excuse the performance, but there is no room in this case for the application of that rule. The defendants' undertaking was absolute to furnish the employment for the period stated and performance was not to depend upon the continued existence of a contract between the defendants and the amusement company or the permission of the amusement company that the plaintiff perform. It was immaterial to the plaintiff under the terms of the contract at what particular theater or theaters in Honolulu she was to appear and she obligated herself to appear at whatever place or places they should reasonably request her to sing. The evidence adduced required the finding that the defendants before entering into the contract knew what degree of ability as a singer the plaintiff possessed and that although in their opinion the quality of her singing had appreciably deteriorated in recent years it nevertheless was satisfactory to them. The testimony of defendant Wise was that he was "perfectly satisfied" and "wanted her to continue." The quality of music that she contracted to furnish to defendants she did furnish for one week and was able and willing to furnish for eleven weeks additional. If it was not such as to please Honolulu audiences the error of judgment was that of the defendants and for that they and not the plaintiff must suffer. If there was no such error of judgment the duty was the defendants' to find a place or places at which the plaintiff was to appear and perform her undertaking.

The exceptions are sustained and a new trial is granted.

W. B. Lymer (*Thompson, Wilder, Watson & Lymer* on the brief) for plaintiff.

J. A. Magoon (*N. W. Aluli* with him on the brief) for defendants.

Medeiros v. Honomu Sugar Co., 21 Haw. 155.

JOHN CARLOS MEDEIROS v. HONOMU SUGAR COMPANY, AN HAWAIIAN CORPORATION.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED MAY 20, 1912.

DECIDED MAY 31, 1912.

ROBERTSON, C. J. PERRY AND DE BOLT, JJ.

NEGLIGENCE—*defective condition of tree near highway—duty of owner.*

The owner of land on which he permits a tree to remain near the public highway is under a legal obligation to take reasonable care that it shall not fall into the highway and injure persons lawfully there. Though the defective condition of the tree was the result of natural causes, still, if such defect was known, or by the exercise of ordinary care could have been known, by the owner, it was the duty of the owner to exercise reasonable care and diligence to prevent the tree from falling and thereby injuring those who might have occasion to use the public highway.

OPINION OF THE COURT BY DE BOLT, J.

The plaintiff filed his declaration in the circuit court of the first circuit seeking to recover from the defendant the sum of \$25,415 as damages for personal injuries alleged to have been sustained by him as the result of the negligence of the defendant. The jury rendered a verdict in favor of the plaintiff, assessing the damages at the sum of seven thousand dollars. The defendant excepted to the verdict "as being contrary to the law and the evidence and the weight of the evidence," and thereafter moved for a new trial. The motion for a new trial was denied, to which ruling the defendant also excepted. It is upon these exceptions that the case comes before us for consideration.

The material facts alleged in the declaration, so far as they are essential to a correct understanding of the case, are substantially as follows: That the defendant owns and operates a sugar plantation at Honomu, on the Island of Hawaii, running along one side of which, is a public highway; that on the land so owned and used by the defendant, and within a short dis-

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tance from said public highway, the defendant, on December 7, 1910, and for a long time prior thereto, "negligently and carelessly allowed and permitted to be, remain, and grow thereon, a certain tree of great height and dimensions, which was dangerous, unstable, insecure and unsafe to persons and vehicles traveling over and upon said public highway;" that on the date mentioned the plaintiff was driving four horses attached to a hearse upon said public highway and when he reached a point opposite the tree it suddenly fell and crashed down upon him, breaking both of his legs, the result of the injury being such, that his right leg was necessarily amputated and his left leg was "permanently shortened, deformed and crippled."

*as the
injury
was
caused
by
the
falling
of
the
tree*

There was no dispute in the court below, nor is there any here, as to the seriousness of the plaintiff's injuries, nor that the injuries were caused by the falling of the tree. The chief question before the jury, as disclosed by the record now before us, was, whether the plaintiff's injuries were the result of the negligence of the defendant. The jury by its verdict answered this question in the affirmative. The question thus presented for our determination is, whether there was sufficient evidence to support the verdict.

The contention of the plaintiff is, that the tree in question was obviously in a dangerous condition, which condition was known, or by the exercise of ordinary care, could have been known, by the defendant, and that the defendant was negligent in permitting it to remain near the public highway over which he, together with the general public, was obliged to travel. Upon this theory of the case the plaintiff adduced evidence tending to show that the tree was from forty to fifty feet in height and about two feet in diameter; that it was an old eucalyptus tree and was standing about twenty-two feet from the highway in question; that it was leaning a little towards the highway; that it was "kind of rotten" and some of the foliage was dry; that some of the roots were exposed;

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that there was a hollow under the trunk of the tree; that there was also a hollow in the tree itself; that it was growing in a clay soil; that trees are not so firmly rooted in clay soil as in other soils; that the ground where the tree was standing was a little higher than the highway and sloped towards the highway; that the dangerous condition of the tree was obvious; that the annual rain fall in that locality is about 160 inches; that during the week preceding the falling of the tree it had been raining more than usual, although at that season of the year more rain falls than at other times; that the ground was damp and soft; that the wind on the day in question was not blowing very hard; that trees, owing to the weather conditions prevailing in that locality, do fall occasionally; that the tree fell diagonally across the road, one of the large limbs striking the plaintiff as he sat on the hearse driving.

With regard to the defective condition of the tree, which the plaintiff sought to establish by certain witnesses who claimed that they were familiar with it prior to the day on which it fell, but did not see it thereafter, counsel for the defendant contends that it does not appear that the tree, concerning which the witnesses so testified, was the tree which fell. We are satisfied, however, after a careful reading of the record, that if the testimony of the witnesses was believed by the jury, and that it was so believed must be conceded, it was sufficient to identify the tree.

The evidence adduced on behalf of the defendant as to the size, age and location of the tree, as well as to the rain fall and condition of the ground in that locality, was practically the same as that of the plaintiff; but as to the condition of the tree and other material facts, the evidence of the parties was in direct conflict. The defendant's evidence tended to show that the tree was in a sound and healthy condition; that it did not lean in any direction, but stood upright; that the roots were not exposed, and the tree, apparently, was firmly rooted, safe and secure; that there was no apparent danger of it falling.

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Counsel for the defendant urges that there is not more than a scintilla of evidence of negligence, and that the verdict is contrary to the evidence, and that, therefore, the exceptions should be sustained. In our view of the case, however, as presented by the evidence on behalf of the respective parties and submitted to the jury under the instructions of the court, it was one clearly and exclusively within the province of the jury to determine; and there being evidence—more than a scintilla—to sustain the verdict, and the record being free from legal objection, the finding of the jury is conclusive. We cannot disturb it.

The defendant also urges, as a defense, that the falling of the tree and the consequent injury to the plaintiff was the “act of God,” or an “inevitable accident.” In the view we take of the case the plaintiff’s injuries were not the result of the “act of God,” nor were they the result of an “inevitable accident.” We take it that counsel has used the term, “inevitable accident,” as the equivalent of the term, “act of God.” 1 Am. & Eng. Ency. Law (2d ed.), 587, 588.

“The expression, ‘act of God,’ is held to exclude all idea of human agency. When the effect, the cause of which is to be considered, is found to be in part the result of the participation of man, whether it be from active intervention, or neglect, or failure to act, the whole occurrence is thereby humanized, as it were, and removed from the operation of the rules applicable to acts of God.” Id. 587, note 1; 1 Cyc. 758, note 8.

Although the defective and dangerous condition of the tree in question (which condition is necessarily implied by the verdict of the jury), was the result of natural causes, still, if such defective and dangerous condition was known, or by the exercise of ordinary care, could have been known by defendant, then it became the duty of the defendant to exercise reasonable care and diligence to prevent the tree from falling and injuring those who might have occasion to use the public highway; and the defendant failing to perform this duty, and as a result of

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such failure the tree fell and injured the plaintiff, the defendant was chargeable with negligence and thereupon became liable to the plaintiff in damages for the injuries so received.

Viewing the entire record before us, including the verdict of the jury and all that it necessarily implies, it is obvious, that all the essential elements of negligence are present: (1) The existence of a duty on the part of the defendant to protect the plaintiff from injury; (2) the failure of the defendant to perform that duty; and (3) injury to the plaintiff from such failure of duty on the part of the defendant. 29 Cyc. 419, 420.

"The owner of a building or other structure abutting on a street or highway is under a legal obligation to take reasonable care that it shall not fall into the street or highway and injure persons lawfully there." Id. 468.

The duty which the owner of a building or other structure abutting on a street, or other public highway, owes to the public and the duty of the owner of land on which he permits a tree to remain near the public highway, are the same in principle. The principle thus invoked by the plaintiff is a familiar one and of wide application in the law of negligence.

The exceptions are overruled.

E. A. Douthitt (*Douthitt & Coke* on the brief) for plaintiff.

M. F. Prosser (*Kinney, Prosser, Anderson & Marx* on the brief) for defendant.

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REBECCA LUKUA AND STEPHEN LUKUA v. KEIUPAINA MANAIA, N. MANAIA, DAVID P. WAIWAIOLÉ, LUKA MANUIA, K. MANUIA, ABRAHAM PANUI, SARAH PANUI, JAMES KAIONA, JAMES KAIONA, JR., A MINOR, KAWAHALOA KAIONA, A MINOR, KĀLAOHĀWĀII KAIONA, A MINOR, SOLOMON KAIONA, A MINOR, AND KALAWAIA KAIONA, A MINOR.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED MAY 23, 1912.

DECIDED JUNE 4, 1912.

ROBERTSON, C. J., PERRY AND DE BOLT, JJ.

INFANTS—*appointment of guardian ad litem—formal order not necessary.*

The appointment of a guardian *ad litem* of minor defendants need not be made by a formal order. Any action on the part of the court whereby a person assuming to act as a guardian *ad litem* is recognized as such is equivalent to an appointment.

SAME—*authority of guardian ad litem to consent to decree.*

A guardian *ad litem* of minor defendants in a partition suit may stipulate for the entry of a consent decree. In the absence of any showing of fraud or bad faith or that the interests of the minors have been prejudiced, such decree will not be disturbed on motion of the purchaser at the partition sale.

JUDICIAL SALES—*application of purchase money.*

The purchaser at a partition sale upon paying the purchase money into court is not bound to see to the application of the money, and, hence, may not complain of a provision in the decree of sale that a portion of the proceeds of sale shall be distributed to the guardian *ad litem* of certain minor defendants who has not been required to give security.

OPINION OF THE COURT BY ROBERTSON, C. J.

A bill for the partition of certain land was filed in the court below on December 15, 1911. The bill was sworn to before a notary public on August 21, 1911, and, bearing the same

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date, were two orders signed by the circuit judge, one for the issuance of process, and the other appointing the defendant J. Kaiona guardian *ad litem* of his minor children who were also parties defendant to the suit. These orders were filed with the bill. Summons issued, and the return of the deputy high sheriff shows that personal service was made on each of the minor defendants. No answers were filed, but on January 5, 1912, a stipulation was signed by counsel for the parties plaintiff and defendant and the guardian *ad litem*, and filed, by which it was agreed that a decree should be entered directing the sale of the land, and, subject to the adjustment of certain claims of some of the parties for moneys expended for the benefit of the property, providing for the division of the proceeds of sale between the parties. The stipulation provided that the minor defendants should take one-ninth of the net proceeds, they being the children of one of the nine heirs of the former owner of the land who had deceased. An interlocutory decree in accordance with the stipulation was entered. The land was sold at public auction and one L. Ah Leong became the purchaser. The circuit judge confirmed the sale. Ah Leong then filed a motion to set aside the order confirming the sale on the grounds that at the date of the appointment of the guardian *ad litem* there was no case pending in court and that the appointment was therefore without jurisdiction; that the guardian *ad litem* was without authority to waive proof of the allegations of the bill or to consent to the entry of the interlocutory decree; that the decree is irregular and improvident in that it directs that the share of the minor defendants in the proceeds of sale be paid over to their guardian *ad litem*; and that as the attorney for the petitioners announced at the sale that the title to the land was good the purchaser was entitled to a marketable title, but which, by reason of the alleged irregularities in the proceedings, he could not obtain. The motion was denied and the movant appealed.

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As to the appointment of the guardian *ad litem*. The order signed by the circuit judge on August 21st was a nullity. At the time that order was made there was no case pending; there were no infants before the court; there was nothing upon which the order could operate. It is not necessary, however, that the record should show that a formal order of appointment had been entered. Counsel for the appellant mistakenly assumes that section 2301 of the Revised Laws provides for the appointment of guardians *ad litem*. That section, relating to statutory and testamentary guardians, implies that courts have the power to appoint guardians *ad litem*. Referring to the statute, this court said in *Ahin v. District Magistrate*, 11 Haw. 279, 281, "The object was, not to grant the power of appointing a guardian *ad litem* or next friend, or to confine it to certain judges, but to make it clear that such power already existing was not intended to be taken away." Courts have inherent power to appoint guardians *ad litem* to represent infant defendants and protect their interests, when involved in litigation. There being no statute in this Territory providing for or controlling the appointment of guardians *ad litem*, our courts proceed upon their inherent authority. Such appointment being a matter of substance rather than of form, any action on the part of the court whereby a person assuming to act as a guardian *ad litem* is recognized as such is equivalent to an appointment. This principle was recognized by this court as to the appointment of a next friend of a minor in the *Ahin* case, *supra*. See also *Estate of Kealiahonui*, 8 Haw. 93, 99. And in other jurisdictions it has been applied in cases involving guardians *ad litem*. *Barnard v. Heydrick*, 49 Barb. 62, 72; *Tibbs v. Allen*, 27 Ill. 119, 124; *Crane v. Stafford*, 217 Ill. 21, 27; *Price v. Winter*, 15 Fla. 66, 104; *Tyler v. Jewell* (Ky.), 11 S. W. 25; *Ridgely v. Bennett*, 81 Tenn. 210, 219. In the case at bar, by direct reference in the decree to the stipulation, the court recognized James Kaiona as the guardian *ad litem* of his minor children, and we think that was sufficient.

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As to the consent decree. It is contended that the guardian *ad litem*, even if properly appointed, was without authority to consent to the entry of the interlocutory decree and thereby waive proof of the allegations of the plaintiff's petition. On this question there is a sharp conflict of authority. The question is an open one in this jurisdiction, but the supreme court of the United States having ruled upon it we have no hesitancy in following that ruling. In *Thompson v. Maxwell Land Grant Co.*, 168 U. S. 451, 462, 463, that court said, "That infants are bound by a consent decree is affirmed by the authorities, and this notwithstanding that it does not appear that a prior inquiry was made by the court as to whether it was for their benefit. * * * Ordinarily indeed a court before entering a consent decree will inquire whether the terms of it are for the interest of the infants. It ought in all such cases to make the inquiry, and because it is its duty so to do it will be presumed, in the absence of any showing to the contrary, that it has performed its duty. In this case, while the decree fails to recite the making of such an inquiry, there is nothing to indicate that it was not made; the circumstances tend strongly to show that it was in fact made, and the finding is that the conclusion reached by the chancellor as to the advisability of the settlement was a sound exercise of his discretion." The case of *Walsh v. Walsh*, 116 Mass. 377, was quoted from approvingly. In that case it was said, "An infant is ordinarily bound by acts done in good faith by his solicitor or counsel in the course of the suit, to the same extent as a person of full age. * * * If the court does pronounce a decree against an infant by consent, and without inquiry whether it will be for his benefit, he is as much bound by the decree as if there had been a reference to a master and a report by him that it was for the benefit of the infant. * * * The case falls within the general rule, that a decree made by consent of counsel, without fraud or collusion, cannot be set aside by rehearing, appeal or review." 116 Mass. 382, 383. In the case at bar no answer was filed

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by the guardian *ad litem*, but as answers of guardians *ad litem* are usually merely formal it is generally held that though it may be advisable to file an answer it is not absolutely necessary. *Bogert v. Bogert*, 45 Barb. 122. The record does not show affirmatively that the court made inquiry as to the rights of the infant defendants in the premises but ample time for such inquiry (thirteen days) elapsed between the filing of the stipulation and the entry of the decree. It is not contended that the court did not satisfy itself as to the propriety of the stipulation, nor is there any suggestion of fraud, or bad faith, or that the property was sold for less than its full value, or that the infant defendants were entitled to a greater share of the proceeds than was awarded them by the decree. Under these circumstances we hold that the decree was binding on the infants and should not be disturbed. Undoubtedly courts should be careful to see that the rights of infants who are brought into court are properly guarded and their interests protected against the antagonistic claims of others, but where litigation has been carried on in good faith and there is no reason to suppose that the interests of minors have not been well taken care of slight irregularities in the proceedings may and should be overlooked. In this case, to set aside the decree and compel a hearing of the case and a re-sale when there is no apparent prospect of obtaining a higher bid for the land or securing a larger share of the proceeds of sale would not be to the advantage of the infant defendants but their disadvantage.

As to the payment of the minors' share of the proceeds to the guardian *ad litem*. On the question of the right of a guardian *ad litem* to receive payment of money due his ward, the authorities are not in accord. In *State v. Ballinger*, 41 Wash. 23, 28, the court said that "the great weight of authority is to the effect that the guardian *ad litem*, while not clothed with the power to compound or settle the judgment in favor of the minor, has a right to satisfy the same." In a note to that case in 3 L. R. A. N. S. 72, it is said that, "the weight of authority in the

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United States is against the authority of a guardian *ad litem* or next friend of an infant to receive payment of and satisfy a judgment recovered in behalf of the infant." It seems to be generally conceded, however, that moneys due and owing to infant litigants may safely be paid into court. This applies to purchasers at judicial sales. Such purchasers are not bound to see to the application of the purchase money. *Knotts v. Stearns*, 91 U. S. 638, 641.

Upon principle we should say that it was improvident and irregular to decree the payment of moneys belonging to the infants to their guardian *ad litem* whose proper functions terminated with the entry of the final decree, and who has not been required to furnish a bond or other security. But as the appellant may pay the purchase money into court, taking the receipt of the commissioner for the same, and is not responsible for the further disposition of it, he is not in a position to ask to be relieved from his purchase.

The trial court may see the advisability of taking steps by supplemental decree or otherwise to require security on behalf of the infants.

We hold that the appellant has not shown that the title to the property is not a marketable one.

The order appealed from is affirmed.

J. Lightfoot for plaintiffs.

Smith, Warren & Hemenuway and E. W. Sutton for defendants.

A. S. Humphreys for L. Ah Leong.

Tyler v. Wise, 21 Haw. 166.

ROSA LEE TYLER *v.* HEN WISE AND KATE MILTON,
DOING BUSINESS AS THE WISE & MILTON
MUSICAL COMEDY AND VAUDEVILLE COM-
PANY, DEFENDANTS, HONOLULU AMUSEMENT
COMPANY, LIMITED, AN HAWAIIAN CORPORA-
TION, GARNISHEE.

TAXATION OF COSTS.

ARGUED JUNE 5, 1912.

DECIDED JUNE 7, 1912.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

COSTS—*transcript of evidence.*

Money paid for a transcript of evidence necessary to the consid-
eration of a bill of exceptions may be taxed as costs.

Id.—*preparation of record for review.*

Money paid to the clerk of the circuit court for comparing,
certifying and typewriting the record on exceptions to this court
may be taxed as costs.

OPINION OF THE COURT BY DE BOLT, J.

The plaintiff's exceptions having been sustained (ante p. 148,) she now presents her bill of costs. Two items are objected to by the defendants, one of \$25 for money paid by the plaintiff for a transcript of the evidence used in considering the excep-
tions and the other of \$10.60 for money paid by the plaintiff to the clerk of the circuit court "for comparing, certifying and typewriting the record on exceptions" brought to this court.

The objection to the item of \$25 is, that the entire transcript of the evidence was unnecessary for the purpose of considering the exceptions brought up. The contention of the plaintiff was, that the judgment rendered by the circuit court was not supported by the evidence, and in view of the findings of fact and conclusions of law made by the court and the conflicting contentions and scope of argument by counsel, it was found necessary and proper to read the entire transcript in order to obtain a clear understanding of the case. *Robinson v. Honolulu Rapid Transit & Land Co.*, 20 Haw. 467.

The objection to the item of \$10.60 is, that it is the duty

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of counsel to prepare the record for review by this court. It must be observed, however, that the clerk has the legal custody of all the pleadings and papers filed and of the record of all the proceedings had in the case, and it being his duty to compare and certify to the correctness of the record sent up, we deem it reasonable and proper that he be employed to prepare the record for review. This practice, we think, tends to secure uniformity and accuracy in the record. The item of \$10.60, except as to \$4.22, which the clerk charged for certain duplicate papers, should be allowed, thus reducing the item to \$6.38. With the exception mentioned, the disbursements were reasonable, and being sworn to by counsel will be allowed.

The bill of costs as presented also contains an item of \$11.75 costs incurred in the circuit court. As the case was sent back for a new trial, we think it proper that this item should abide the final result in the lower court and be taxed there.

The costs are taxed at the sum of \$48.13.

W. B. Lymer for plaintiff.

J. A. Magoon for defendants.

MARY J. DAVIS v. HARRY T. MILLS

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED JUNE 3, 1912.

DECIDED JUNE 7, 1912.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

LIMITATION OF ACTIONS—*acknowledgment and new promise.*

An assertion by the debtor that "it" (the indebtedness sued on) "will be fully and satisfactorily met later on" is sufficient as an acknowledgment and new promise to take the case out of the operation of the statute of limitations.

EVIDENCE—*parol evidence to explain contract.*

Parol evidence is inadmissible to explain or vary the plain meaning of the language of a written agreement.

Davis v. Mills, 21 Haw. 167.

ATTACHMENT—*sufficiency of affidavit.*

The statute on attachment (L. 1909, Act 60) requires that the affidavit in support of the application for the writ show on its face that the indebtedness specified is "over and above all just credits and offsets."

OPINION OF THE COURT BY PERRY, J.

This is an action of assumpsit upon a joint and several promissory note for \$210 dated July 1, 1898, and payable on demand. At the trial the defendants admitted the execution and delivery of the note and relied upon the statute of limitations as their sole defense. It appeared from the evidence that two years' interest had been paid and that on October 3, 1903, the additional sum of \$20 was paid on account of interest. For the purpose of taking the case out of the operation of the statute the plaintiff by undisputed evidence proved the delivery of the following letters, the first dated September 15, 1905, and addressed by the plaintiff to the defendant Harry T. Mills and the second written by Mills in reply and dated October 2, 1905: "It is now nearly two years ago since you promised me by letter to send to me some money and later on King Street you thought you could let me have some at which time you promised to call and see me; very strange I think it that neither of these promises have yet been fulfilled and no reason given for such neglect. I am wanting money therefore please let me know without delay what you intend to do." "Your recent letter addressed to Napoopoo is at hand; the delay in replying is owing to the fact that my P. O. is at Kealakekua; will attend to the matter spoken of at the earliest possible moment. At present writing it is impossible for me to write otherwise but it will be fully and satisfactorily met later on." The plaintiff's testimony was sufficient to show that the indebtedness referred to in her letter was that on the note now sued on. A motion for nonsuit was granted as to the defendant Mary K. Mills but denied as to the defendant H. T. Mills. The judgment was for the plaintiff. The exceptions of H. T. Mills present the question of the suffi-

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ciency of the letter of October 2, 1905, as a new promise and of the correctness of rulings, rejecting evidence tending to show that at the date of the letter the appellant was not financially able to pay the indebtedness and that the letter was not intended by him as a promise to pay it.

In our opinion the defendant's letter, read in connection with that of the plaintiff to which it was a reply, not only contains a distinct recognition of the existence of the debt but also constitutes an unconditional promise to pay the debt. The verb "to meet", when used with reference to a financial obligation, is ordinarily used as meaning "to pay". Lexicographers give this as one of the recognized definitions of the word. "The matter spoken of" was clearly that mentioned in the plaintiff's letter, the indebtedness on the note, and the statement "it will be fully and satisfactorily met" refers with equal clearness to the same obligation. It is as though the statement had been that "the indebtedness will be fully and satisfactorily met." That the defendant added that "the matter spoken of" would be attended to "at the earliest possible moment" and that the payment would be "later on" did not render the undertaking insufficient as a new promise within the meaning of the rule on the subject. The promise was nevertheless absolute. The language used was unambiguous and extrinsic evidence was therefore inadmissible to vary its plain meaning. So, also, of the proposed evidence of defendant's lack of financial ability. The promise was not subject to any condition concerning the defendant's ability to pay. There is nothing in the letter that can be construed as the equivalent of such a condition.

Upon the filing of the declaration an attachment was issued and levied upon the property of the defendants. To the denial of a motion to dissolve the attachment an exception was noted. The motion should have been granted. The statute on the subject (section 3 of Act 84, L. 1905, as amended by section 2 of Act 60, L. 1909) provides: "The writ of attachment shall be issued by the clerk of the court in which the action is pend-

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ing; but before any such writ of attachment shall issue, the plaintiff, or some one in his behalf, shall make and file with such clerk an affidavit showing that the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all just credits and offsets) and that the attachment is not sought and the action is not prosecuted to hinder, delay or defraud any creditor of the defendant." The affidavit filed in support of the attachment recites, with reference to the indebtedness, "that the above named defendants are indebted to her", the plaintiff, "in the sum of \$210.00, together with interest from the 1st day of July 1900, at the rate of 9% per annum, less the sum of \$20.00 paid on account of such interest on or about the 3rd day of October, 1903", and "that said sum of money with interest thereon, is due to plaintiff from defendants for money borrowed by defendants on said 1st day of July, 1898", but does not show directly or indirectly that the indebtedness mentioned is over and above all just credits and offsets. The mere acknowledgment that the interest has been paid to July 1, 1900, and that the further sum of \$20 has been paid on account of interest subsequent to that date is not in effect an assertion that there are no offsets. The statute contemplates that the affidavit shall show on its face that the specified indebtedness is "over and above all just credits and offsets" and compliance with the requirement is indispensable to the valid issuance of an attachment. *Kerns v. McAuley*, 8 Idaho 558. In spite of the showing made by the affidavit it may be that offsets exist in favor of the defendant and against the plaintiff.

The exception to the refusal to dissolve the attachment is sustained and all of the other exceptions are overruled. The cause is remanded to the circuit court with directions to dissolve the attachment and for such further proceedings as may be appropriate.

W. W. Thayer for plaintiff.

C. F. Peterson for defendant.

Honolulu Rapid Transit & Land Co. v. Territory, 21 Haw. 171.

HONOLULU RAPID TRANSIT & LAND COMPANY *v.*
THE TERRITORY OF HAWAII AND MARSTON
CAMPBELL, SUPERINTENDENT OF PUBLIC
WORKS.

SUBMISSION UPON AGREED STATEMENT OF FACTS.

SUBMITTED JUNE 13, 1912.

DECIDED JUNE 15, 1912.

ROBERTSON, C. J., PERRY AND DE BOLT, JJ.

SUBMISSION OF CONTROVERSY—*judgment.*

Where, in a submission on agreed facts without action, the case presented is such that an enforceable judgment cannot be entered, the proceedings should be dismissed.

SUPPLEMENTAL OPINION OF THE COURT BY ROBERTSON, C. J.

Following the filing of the opinion in this case reported *ante* p. 136 counsel for the railway company informally notified the court of the company's intention to take an appeal, and the question as to what form the judgment should take having arisen counsel for both parties were notified that they would be heard on the point. The matter has been fully argued orally and in briefs. Counsel for the government have taken the position that, upon several grounds which we will not stop to review in detail, no judgment can properly be entered in the case. Counsel for the railway company contend, first, that the submission should be regarded as having taken the place of a petition for a writ of mandamus, in which case the judgment should award a peremptory writ, and, second, and alternatively, that it may be regarded as a bill for an injunction, in which case the prayer for an injunction would be denied and the bill dismissed.

We think the submission was entered into by the parties without any thought as to the entry of a judgment in the case. It seems as though counsel had in mind only the obtaining of the views of the court on the questions stated in the submission.

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The case was argued and submitted for determination without any reference being made by counsel as to what judgment should be entered, and we must confess that in rendering our opinion we did not consider the point. Notwithstanding what was said in *Bishop v. Judd*, 4 Haw. 29, 32, in regard to the possibility of the statute providing for the submission of controversies without action being so used as to make the court an office of consultation, we fear that some laxity has entered into proceedings heretofore brought under the statute. It is clear that the statute contemplates the entry of an enforceable judgment (R. L. Sec. 1751) and we cannot give our approval to the entry of a judgment that merely answers certain questions such as was done in the case of *Rapid Transit Co. v. Tram Co.*, 13 Haw. 363.

There are several reasons why the submission should not be regarded as having taken the place of a bill for an injunction to prevent the paving of the portion of the street referred to by the government. The submission contained no allegation of any threat that unless the company should do the paving the government would do it at the company's expense; nor was there an allegation that the company had been notified that the municipality was about to proceed with the work with the intention of bringing suit against the company to recover the cost; the municipal officials were not made parties; and it is not likely that an injunction would have been sought against the Territory.

Nor can the submission be regarded as a proceeding for a writ of mandamus instituted by the Territory. In addition to the fact that the parties appear not to have contemplated the entry of a judgment, but only that the court would answer the questions propounded, the submission itself shows that the railway company assumed the position of plaintiff in the case. The concluding clause of the submission is as follows: "Wherefore, plaintiff and defendants submit the matter for judgment."

An argument was advanced by counsel for the government

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to the effect that no judgment can be entered because the parties to the submission did not designate the nature of the judgment desired. The cases in other jurisdictions are in conflict on this point. See *Woodruff v. People*, 193 N. Y. 560; *Williams v. Iredell County*, 132 N. C. 300. The provisions of our statute perhaps are sufficient to authorize the entry of judgment without any prayer therefor by the parties if no obstacle intervenes. R. L. Secs. 1750, 1751. A prayer for judgment designating the nature of the judgment desired would undoubtedly conduce to certainty, but a ruling upon the necessity of such a prayer is, in our view, not required in this case.

For the reasons above assigned we hold that this submission cannot be regarded as an injunction bill or a proceeding in mandamus, and that no enforceable judgment can be entered in the case. We also hold that because of the fact that such a judgment cannot be entered the entire proceedings must be dismissed. It is so ordered.

D. L. Withington (Castle & Withington on the brief) for the Rapid Transit Co.

A. G. Smith, Deputy Attorney General, for the Territory and Superintendent of Public Works.

F. W. Milverton, Deputy City and County Attorney, filed a brief on behalf of the City and County of Honolulu.

No. 65. KANEOHE RANCH COMPANY, LIMITED, v. KANEOHE RICE MILL COMPANY, LIMITED, ET AL. Appeal from Circuit Judge, First Circuit, sitting as Commissioner of Private Ways and Water Rights. Motion to strike papers from the files. Argued June 17, 1912. Decided June 19, 1912. Robertson, C. J., Perry and De Bolt, JJ. Per Curiam: The petitioner moves to strike from the files of this

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court "the papers purporting to be a record of a hearing and determination" by the commissioner "of a controversy respecting water rights" between the parties above named, forwarded to this court on the appeal of the Kaneohe Rice Mill Company, Limited. The only ground of the motion now relied upon is that the commissioner has not transmitted to this court as a part of the record the exhibits and a transcript of the testimony. Stenographic notes were taken of the testimony adduced before the commissioner but the notes have not been transcribed. The statute relating to the determination of controversies concerning water rights contemplates (R. L., §§2202 and 2204, as amended by §§4 and 6 of Act 56, L. 1907) that in case of appeal the exhibits and a transcript of the testimony shall be forwarded by the commissioner to this court. In the absence, at least, of a stipulation by all parties concerned in the appeal to the effect that all of the material findings of fact warranted by the evidence are made and stated in the decision of the commissioner, the exhibits and transcript should in all cases of this nature be made a part of the record on appeal in order to enable this court to make a final determination of the cause. It appearing from the record that the present appeal has been duly taken and perfected and that the papers referred to in the motion are properly on file as a part of the record on appeal, the motion is denied and the time within which the exhibits and a transcript of the testimony may be transmitted to this court is extended for the period of thirty days from this date.

Castle & Withington for plaintiff.

Thompson, Wilder, Watson & Lymer and *Holmes, Stanley & Olson* for Kaneohe Rice Mill Co.

Kinney, Prosser, Anderson & Marx for Nannie R. Rice and David Rice.

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IN THE MATTER OF THE PETITION OF THE TERRITORY OF HAWAII TO REGISTER AND CONFIRM ITS TITLE TO CERTAIN LAND SITUATE IN LAHAINA, ISLAND OF MAUI, TERRITORY OF HAWAII, AND KNOWN AS PA PELEKANE.

APPEAL FROM COURT OF LAND REGISTRATION.

SUBMITTED MAY 29, 1912.

DECIDED JULY 10, 1912.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

RECORDS—*registration of title to land—nature of proceeding.*

A proceeding to bring land under the statute providing for the registration of titles partakes of the nature of a suit in equity, and it is not correct practice in such a proceeding to dismiss the application at the close of the petitioner's case on the motion of respondent unless the respondent also rests.

SAME—*failure of proof—amendment of pleadings.*

Where, in such a proceeding, the application sets forth a claim of title in fee simple absolute and alleges a source of title which is legally invalid, but no objection was raised to the form of the pleading, any evidence tending to prove the general claim of title in fee simple is admissible, and the matter of amending the application may remain in abeyance until the close of the evidence.

EMINENT DOMAIN—*power to exercise—privy council.*

A resolution of the privy council of the Hawaiian Kingdom that certain land "be and is hereby confirmed as government property and that Governor Kekuanaoa's claim therefor is hereby negatived," adopted in response to an adverse claim by Kekuanaoa on behalf of another individual for the land mentioned, was not intended to be and was not an exercise of the power of eminent domain.

PUBLIC LANDS—*acquisition of private title.*

The title to land which was never awarded by the land commission nor granted by the government remains in the government. The Mahele of 1848 did not confer title on the chiefs to the lands therein set apart to them.

SAME—*award of land by name.*

The award of an ahupuaa by name only would not pass title to a piece of land which, though originally a portion of the ahupuaa,

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had, prior to the award, been permanently detached from and taken out of the ahupuaa.

EVIDENCE—judicial notice.

The former governments of the Hawaiian Islands are not to be regarded as foreign governments. The courts of this Territory take judicial notice of the laws of Hawaii which were enacted prior to the annexation of the islands by the United States, as well as of the principal facts of Hawaiian history, and the public records of the Hawaiian government when called to the attention of the court.

OPINION OF THE COURT BY ROBERTSON, C.J.

This is an appeal taken by the Territory from a judgment made and entered by the court of land registration denying and dismissing its application to have registered a fee simple title to a parcel of land situate at Lahaina, Maui, known as "Pa Pelekane," containing an area of 2.28 acres. In response to the usual notice given in such cases several persons appeared and filed answers. Among the respondents who thus appeared were the trustees under the will and of the estate of Bernice P. Bishop, deceased, who claimed title in fee simple to the land described in the petition except a portion thereof theretofore conveyed by them to one E. K. Nahaolelua, the ancestor of some of the respondents. The other respondents set up claims to distinct portions of the land and some of them denied that the Territory had any title in or to any of the land described in the petition. The third paragraph of the petition sets forth, "That the Hawaiian Kingdom obtained title to said property on August 29, 1850, by a resolution of the Privy Council reserving and confirming the said Pa Pelekane as Government property, said resolution being on file in the office of the Department of Public Lands of the Territory of Hawaii, in Vol. 3, p. 427, of the Privy Council Records, and the Territory of Hawaii obtained title to said property by virtue of its political succession to the said Hawaiian Kingdom."

The Territory's contentions are recapitulated in the attorney

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general's brief as follows: "(1) That this land of Pa Pelekane had, prior to the Mahele, been set apart by the King as Government land for the use of the Government. (2) That if the Government had not acquired title by eminent domain prior to the Mahele, it did acquire such title by virtue of certain resolutions of the Privy Council purporting to confirm the same as Government land, some of these resolutions being made after the Mahele, but prior to the land commission award to Victoria Kamamalu, others being after the award but prior to the issuance of the patent. (3) That the land of Pa Pelekane was not situated within the ancient boundaries of the Ahupuaa of Paunau. (4) That even if it was located within the ancient boundaries of Paunau, yet that this land of Pa Pelekane was what is known as town lots or house lots within the class denominated as being situated in Hilo, Lahaina or Honolulu, and so did not pass by the grant of the Ahupuaa, and (5) That the Territory, as successor to the Kingdom of Hawaii, has obtained title to this lot by prescription."

At the hearing counsel for the Territory offered in evidence the resolution of the privy council referred to in the application claiming that it was evidence of "the exercise of the right of eminent domain," and also of the fact that the land in question "had always been government land." The respondents objected to the evidence and it was rejected. The Territory had failed to prove the source of title set up in its application, but certain evidence as to adverse possession was before the court and that tended to show that the petitioner was entitled to a registered title to a part, at least, of the land described in the application. Considerable evidence as to possession by and under the government was offered and much of it was admitted—some without objection and some over objections as to its competency. The claim of title by adverse possession was inconsistent with the claim that the land in dispute was never the subject of private ownership, and evidence of possession need not have been offered except in reply to an affirmative showing of title on the part of

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the respondents. If Pa Pelekane was never awarded by the land commission and had not been sold by the government the title remained in the government and it was not necessary for the Territory to show that the government had had possession. However, the evidence was received and the court was bound to consider it.

At the close of the case for the Territory, the respondents, without resting, moved that the application be dismissed on the ground that the petitioner had failed to establish or support the material allegations of the petition, and had failed in its proof. The court granted the motion. The procedure was improper. A proceeding to bring land under the operation of the law providing for the registration of titles is of the nature of a suit in equity, and the rules of equitable procedure generally apply. In equity it is not correct practice for the court to dismiss a bill at the close of the complainant's case, on the motion of the respondent, unless the respondent also rests. *Territory v. McCandless*, 16 Haw. 728; *Teixeira v. American D. G. Assn.*, 17 id. 41; *Estate of Keaho*, id. 308. But as pointed out by the *Teixeira* case, if it appears that the plaintiff is not entitled to relief under the pleadings and evidence a decree of dismissal will not be reversed because of the error. It will be necessary, therefore, to ascertain whether in this case the petitioner was entitled to any relief. The statute (R. L. Sec. 2414) requires that the application shall contain "a description of the land, with a statement of whether an absolute, a qualified, or possessory title is required." The form of application given in the statute, which is permissive, contains the following paragraph: "That I (or we) obtained title (if by deed, state name of grantor, date and place of record, and file the deed, or state reason for not filing. If in any other way, state it)." The claim made in the Territory's application was for "the legal estate in fee simple absolute" while the source of title was given as already explained. Assuming that no title was or could have been derived by or through the resolution of the privy council, the de-

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fect in the application was apparent on the face of the pleading and presented a question of law. The point was one which should have been raised by pleading. It is immaterial here whether the objection might have been made by demurrer, exception, or answer, but if the respondents intended to rely on the point they should have raised it in some way before the hearing. However, they did not raise it until after the hearing had begun. Besides some oral testimony and formal proofs, a mass of documentary evidence was offered, all but such as the court considered admissible on the question of adverse possession being rejected. The evidence admitted tended to show that the successive governments of these islands had occupied and used, apparently under claim of right, certain portions of the land in dispute for a great many years and longer than necessary to have acquired title by adverse possession if the land had previously been held in private ownership. Most of the respondents concede that adverse possession was shown as to the land covered by the lighthouse and the wharf site, but they claim that the Territory is not entitled to have its title registered as to those portions of the land because no offer or attempt to amend the application was made so as to limit the claim to those portions and to define them. It is in this connection that the error in granting the motion to dismiss is made clear. The court always has power to dismiss a bill of its own motion where there has been a total failure of proof, but in a case where there is only a partial failure of proof, or it appears that the plaintiff is entitled to some relief, the court, acting *sua sponte*, should not dismiss the bill without giving the plaintiff an opportunity or option to amend if an amendment be necessary to enable the plaintiff to obtain the relief to which the evidence shows him to be entitled and is allowable under the rules relating to amendments. Under the circumstances shown it was not incumbent on the Territory to ask leave to amend the application. The matter of amendment should have been left in abeyance until the respondents had rested their case and the evidence was all in. The error requires the reversal of the judgment.

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The rejection of certain evidence offered by the Territory which we believe ought to have been admitted furnishes an additional reason for reversing the judgment. We think that the failure of the respondents to make objection to the form of the application with reference to the statement of the source of petitioner's claim of ownership required the admission of all such legal evidence as was offered in support of the general claim of title in fee simple. The reference to the resolution of the privy council of August 29, 1850, did not state a source of title, and at this stage the allegation may be regarded as surplusage, but the claim of ownership in fee simple absolute was alleged and the Territory was entitled to prove it if it could.

The writer, speaking for himself only, is of the opinion that the contention advanced on behalf of the Territory that the privy council at the time referred to (or at any time for that matter) possessed the power of eminent domain is not sustained. The right of eminent domain is an inherent prerogative of sovereignty, though under civilized governments its exercise is usually regulated by express law. "The power to take private property for public uses, generally termed the right of eminent domain, belongs to every independent government. It is an incident of sovereignty, and, as said in *Boom v. Patterson*, 98 U. S. 106, requires no constitutional recognition. The provision found in the Fifth Amendment to the Federal Constitution, and in the constitutions of the several States, for just compensation for the property taken, is merely a limitation upon the use of the power. It is no part of the power itself, but a condition upon which the power may be exercised." *United States v. Jones*, 109 U. S. 513, 518. In the early history of these islands the power resided, of course, in the King. This was recognized in the "Principles adopted by the Board of Commissioners to Quiet Land Titles" (1846) wherein, in the enumeration of the sovereign prerogatives affecting lands, was included the power "to resume certain lands upon just compensation assessed, if for any cause the public good or the social safety requires it." But the exer-

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cise of the power was not restricted by law until the constitution of 1852 provided that "no part of the property of any individual can, with justice be taken from him or applied to public uses without his own consent, or that of the King, the Nobles, and the Representatives of the people. And whenever the public exigencies require that the property of any individual be appropriated to public uses, he shall receive a reasonable compensation therefor." The declaration in the constitution of 1840, which has been adverted to by counsel, that, "Protection is hereby secured to the persons of all the people, together with their lands, their building lots, and all their property, while they conform to the laws of the kingdom, and nothing whatever shall be taken from any individual except by express provision of the laws," did not, in my opinion, affect the sovereign right of eminent domain. From a royal edict of June 7, 1839, which was enacted by legislative authority on November 9, 1840, it would appear that the King had exercised the power (if the phrase is applicable to conditions then existing) through the chiefs. The act referred to is that which provided for the restoration of "all residuum lands," which had been separated by the chiefs, to the lands to which they formerly belonged, excepting, however, building lots, royal demesne lands, and "places which have been taken by the chiefs for the public interests of the King." As the act was passed before private titles to land were formally recognized by law little importance would attach to it did it not show the understanding of the time that any parcel of land which had been taken for and was devoted to public purposes should no longer be regarded as an integral part of the larger land from which it had been so separated, and, therefore, that title to it would not pass with the award or grant of the larger land by name only. The right to exercise the power of eminent domain may be delegated, but there is no evidence of its ever having been conferred upon the privy council. The constitution of 1840 contained no reference to a privy council. The act of October 29, 1845, entitled "An Act to Organize the Executive Ministry

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of the Hawaiian Islands," provided for a privy council consisting of the King's five ministers, the governors, *ex officio*, as honorary members, and such other honorary members as the King, with the attestation of the Premier, might appoint, which should convene at the call of the King and Premier. As thus established, the privy council was a part of the executive branch of the government with powers of an advisory nature. The act provided that after discussion in council all acts of an executive nature should emanate from the King and be countersigned by the Premier. Certain acts of the executive required the concurrence or approval of the council, and subsequent statutes conferred a great variety of duties of an executive nature upon the council, but they were mainly of a negative character, merely requiring its consent or approval to certain acts. Article 35 of the constitution of 1852 provided that all official acts of the King, other than the approval of laws, should be approved by the privy council. At no time did the privy council possess legislative powers. *Territory v. Liliuokalani*, 14 Haw. 88. The provision of the statute of May 31, 1841, referred to in the Territory's brief, that between sessions of the legislature the King, the Premier, and "the Nobles resident near" could pass laws which should be in force until the next meeting of the legislature, did not refer to the privy council. The act of 1845 expressly provided that "it shall in no case be indispensable to the validity of an executive sanction that a law be first submitted to the privy council." Among the important functions of the privy council were those conferred upon it by the early statutes with reference to land matters. The King, with the advice and consent of the council, fixed the amount of the commutation to be paid to the government, in each case, upon the issuance of royal patents to land. Proposed purchases of land by the minister of the interior for government purposes were required to be submitted to the King in privy council for approval. Leases of government lands to private parties were made by the minister of the interior with the "approbation of the King and upon vote of the privy coun-

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cil." Rights to quarry stone were granted by His Majesty in privy council, and the minister of the interior with the approbation of the privy council was authorized to lay restrictions on the taking of timber from the forests. The act of June 7, 1848, authorized the minister of the interior, upon the approval of the King in privy council, to dispose of the lands by that act set apart to the government. The Territory endeavored to introduce evidence of acts done by the privy council which, it was contended, could not be ascribed to any express grant of authority, and therefrom it has been argued that all the powers of the privy council were not embodied in express statute. Some of those acts are referable to the powers mentioned, others are not. But the privy council could not enlarge its own powers by exceeding the authority granted to it by law, and there is nothing in the law to justify a ruling that the council possessed the power of eminent domain. We hold, however, that the resolution of August 29, 1850, should have been received as competent evidence in support of the claim that Pa Pelekane (otherwise called Beretania) had previously been taken, set apart and held by the government for public purposes. Two other resolutions of the privy council which were offered in evidence but refused admission were also competent as tending to show the same thing. On March 5, 1850, upon the application of one H. Swinton to purchase the land, it was "Resolved, that Pelekane in Lahaina, Maui, be not sold to H. Swinton as it is a place to which many historical associations are attached, and which has already been set apart as a place not to be sold." On May 16, 1850, upon the application of H. S. Swinton to lease the land, it was "Resolved, that the lot Beretania, in Lahaina, applied for by Mr. Swinton be not sold or leased as the government may require it for public buildings." Both of those acts were done within the scope of the council's authority as the approving power to sales and leases of government land. The resolution of August 29, 1850, had reference to a claim submitted by Governor Kekuanaoa on behalf of Princess Victoria Kamamalu. It

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was "Resolved, that the premises known as Beretania, in Lahaina, Maui, be and is hereby confirmed as government property and that Governor Kekuanaoa's claim therefor is hereby negatived." As already said, that resolution did not constitute an exercise of the right of eminent domain. We think it was not so intended. But, as also stated above, it was evidence that the land was held by the government as public property. In response to a claim for the land made against the government through the council it was competent for the council to make the declaration which the resolution embodied. To look at it from the opposite point of view: If the privy council had recorded its approval of the Kamamalu claim, and thereafter until the institution of this case the government had not exercised or asserted any claim to the land, we have no doubt but that the action of the council would have been competent evidence in favor of those succeeding to Kamamalu's title. In this connection, as corroborative evidence, reference may be made to a joint resolution passed by the legislature on July 6, 1852, whereby the minister of the interior was authorized to establish a battery and mount guns on the land of Beretania.

The contention of the respondents is that the land in dispute is a part of the ahupuaa of Paunau which was set apart to Victoria Kamamalu in the Mahele of 1848; that said ahupuaa was awarded, pursuant to the Mahele, by the Land Commission on April 7, 1854 (L. C. A. 7713); and that upon that award Royal Patent 4775 was issued to Victoria Kamamalu on April 3, 1861. The respondents, most of whom claim under the award, urge that the resolutions of the privy council could not affect the title so granted to Kamamalu. The award and patent, however, conveyed the land without survey or description other than the name "Paunau." The claim that Pa Pelekane was a part of the ahupuaa of Paunau is based on the opinion of the examiner of the court to whom the Territory's application had been referred for investigation and report. At the same time the respondents decline to concede any force to the examiner's further

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opinion that "the petitioner has a good title as alleged and proper for registration." Whether facts found and reported by an examiner of titles, acting under the statute, are to be regarded as evidence upon the hearing of a contested case we need not decide, but we take it to be clear that the examiner's opinions, though properly expressed in the course of his report, or as the result of his investigations, are not evidence for or against a party upon a trial of the issues. There was no evidence before the court that the ahupuaa of Paunau as known and understood at the time either of the Mahele or of the land commission award included Pa Pelekane. The question would be what passed by the award rather than what was referred to in the Mahele. As frequently held, private titles were not acquired by the Mahele, but upon the awards of the land commission subject to which the Mahele was understood to have been made. *Kenoa v. Meek*, 6 Haw. 63; *Thurston v. Bishop*, 7 Haw. 421; *Atcherley v. Lewers & Cooke*, 18 Haw. 625. The evidence offered by the Territory tended to show that Pa Pelekane was unawarded land and that the title was in the government, and would, in the absence of any showing that it was included in the ahupuaa of Paunau and passed by the award to Kamamalu, or was the subject of some other award or grant claimed under by the respondents, entitle the Territory to the registration of the title. The Territory did not have to negative the claims set up in the answers of the respondents. *Glos v. Hoban*, 212 Ill. 222; *McMahon v. Rowley*, 238 Ill. 31.

This controversy, upon its merits, involves two principal questions, viz.: (1) Did the title to Pa Pelekane ever pass into private ownership by any award or grant, and (2) If the land was ever the subject of private ownership, has the government acquired title thereto, or any part thereof, by adverse possession. These issues may be tried under the pleadings as they stand, subject to possible amendment of the application to conform to the facts as they may appear at the close of the case. Included in the first general question are the other questions, as to what

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are the boundaries of Pa Pelekane; and whether Pa Pelekane was originally a part of the ahupuaa of Paunau, and if so, whether it was detached from and taken out of the ahupuaa prior to the date of the award to Kamamalu. Counsel for the respondents have cited the case of *In the Matter of the Boundaries of Pulehunui*, 4 Haw. 239, where it was held that an award or grant of an ahupuaa or ili by name would pass title to whatever was included in such tract according to its boundaries as known and used from ancient times. There can be no doubt as to the correctness of the principle there laid down as a general rule, and there was no occasion in that case to consider any exception to the rule. That there are exceptions to it is shown by other cases decided by this court. See *Keelikolani v. Robinson*, 2 Haw. 522; *Kanaina v. Long*, 3 Haw. 332; *Harris v. Carter*, 6 Haw. 195. Any admissible evidence which may be offered by the Territory tending to show that, within the principle of the cases referred to, Pa Pelekane, though originally a part of Paunau was not included in the award of that ahupuaa, should be received.

It will not be necessary to consider all of the numerous objections lodged by the appellant against the rulings of the court below in rejecting evidence offered by the petitioner. It is apparent from what has been said that many of those rulings were erroneous. Upon the new trial which will be had they will be corrected, and others not touched upon may not be repeated. We will refer briefly to some of the more important documentary evidence which was offered. The record of the proceedings of the privy council of May 24, 1859, referring to the petition of Governor Kekuanaoa asking that the land of Beretania be restored to Princess Kamamalu was admissible as evidence tending to show that at that time the government was in possession of the land in question. Land commission award 8559 to Kanaina, dated March 31, 1855, describing a piece of land at Lahaina purporting to adjoin government land which, it is claimed, is the land in dispute, would be admissible if supplemented

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by testimony showing its location to be as claimed. It would tend to prove the boundary of Pa Pelekane along the line described, and, what perhaps is more important from the standpoint of the Territory, it would go to show that the land in dispute had not been previously awarded by the land commission. Certain entries in the cash books of the department of the interior of the Hawaiian government, purporting to have been made during the years from 1879 to 1882, showing the receipt of rent from tenants of portions of Pa Pelekane, where admissible in connection with other evidence showing that the persons named in the entries were in possession of portions of the land. The books were shown to be official records of the government kept in the usual conduct of the office, being produced from the proper repository, and the entries were shown by a witness to have been made in the usual course of duty by clerks of the department of whom the witness was one, the other being dead. The showing made was quite sufficient. 1 Greenleaf, Ev., Secs. 483, 485.

One ruling made by the court below in the course of the hearing prompts us to advert to another point. The court expressed the view that the former governments of these islands were, as to the present government, foreign governments. That is a mistaken view. The courts of this Territory should take judicial notice of the laws of Hawaii which were enacted at any time prior to the annexation of these islands by the United States. So also as to the principal facts of Hawaiian history. The supreme court has decided that where a country has been acquired by the United States the laws which prevailed there prior to the acquisition are not regarded as foreign laws but those of an antecedent government which the courts of the United States will take judicial notice of. *United States v. Perot*, 98 U. S. 428; *United States v. Chaves*, 159 U. S. 452. In *United States v. Teschmaker*, 22 How. 392, 405, it was held that official records of the Mexican government kept in the archives at Monterey, California, are public documents which the court has a right

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to consult even if not made formal proof in a case. And in *Lowrey v. Territory of Hawaii*, 19 Haw. 123, 125, this court "referred to proceedings of a public nature of which it would ordinarily take judicial notice, and to documents from the public archives when specifically referred to in the exhibits on file."

The judgment appealed from is reversed and a new trial granted.

Alexander Lindsay, Jr., Attorney General, and A. G. Smith, Deputy Attorney General, for the petitioner.

Holmes, Stanley & Olson, Castle & Withington, J. Lightfoot, Larnach & Robinson, and R. P. Quarles for the respondents.

OPINION OF PERRY, J., CONCURRING IN PART AND DISSENTING IN PART.

In the petition for registration it is alleged that "the Territory of Hawaii has the power of disposing of the legal estate in fee simple absolute" of the parcel of land situate at Lahaina, Maui, known as Pa Pelekane, which is the subject of the proceeding. If this were the only allegation on the subject, the Territory would doubtless be at liberty to present, under the pleading and without amendment, proof of derivation of its title from any legal source or sources whatever; but the allegation does not stand alone. It is followed by the statement that "the Hawaiian Kingdom obtained title to said property on August 29, 1850, by a resolution of the Privy Council reserving and confirming the said Pa Pelekane as government property, said resolution being on file in the office of the Department of Public Lands of the Territory of Hawaii in Volume 3, page 429, of the Privy Council records and the Territory of Hawaii obtained title to said property by virtue of its political succession to the said Hawaiian Kingdom." The later statement qualifies the first and is to be read as a part of it. It is immaterial that the two are in separate paragraphs. The allegations read together are in effect an assertion that the fee simple absolute which the Territory claims as the successor of the Kingdom was derived by the

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Kingdom under the resolution referred to. If it is found as matter of law that the resolution was not an exercise of the power of eminent domain and did not have the effect claimed for it, the whole averment of title fails and without amendment evidence of the derivation of title from other sources would be inadmissible. It may be that under the statutes relating to the registration of titles to land it was not incumbent on the Territory to specify the source of its title but having voluntarily done so it undertook, under the ordinary rules of pleadings and procedure, to prove the title as alleged and to confine itself to that issue,—subject always, of course, to its right to amend under the statute. None of the respondents, however, demurred to the petition nor was the point raised at the trial. Without objection on the ground just mentioned, evidence was offered and received to show (a) the acquisition of title by the Kingdom and the Territory by adverse possession as well as by eminent domain by virtue of the resolution of the Privy Council and also, perhaps, (b) by continuation of the ancient title of the king in his successors by reason of the absence of any award or patent. Since in any event a new trial is to be granted on other grounds, the Territory should under these circumstances and in view of the liberal provisions of the statute in this respect be now permitted to amend its petition so as to cure the defect above noted and render admissible evidence of any lawful claim of title which it may deem fit to present.

The presentation and the admission of evidence of the acquisition of title by the petitioner by adverse possession, during its case in chief, while at the same time it was claiming that the land remained unawarded, was not inappropriate or erroneous. Whatever rule is ordinarily followed in actions of trial of title to land, the Territory was at least not required to refrain from presenting its evidence of adverse possession until its case in rebuttal. The offer of the evidence was an appropriate precaution against the possibility of a successful motion to dismiss

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based upon the weakness in law or in fact of the other claims advanced.

One of the contentions of the Territory at the trial and in this court is that the Kingdom derived title by virtue of the power of eminent domain exercised by means of a resolution of the Privy Council adopted August 29, 1850, and reading: "Resolved, that the premises known as Beretania in Lahaina, Maui, be and is hereby confirmed as government property and that Governor Kekuanaoa's claim therefor is hereby negatived." It is unnecessary to consider whether or not the Privy Council possessed in 1850 or at any other time the power of eminent domain. Assuming for the purposes of this appeal that it did, a sufficient answer to the contention now under consideration is that the resolution was not an exercise of that power. It did not on its face purport to be. On the contrary, it clearly appears from its language that it was not. It is recorded in the minutes of the proceedings of the council for the day named that "Kekuanaoa on behalf of Victoria claimed a piece of land called Beretania and a wharf lot in Lahaina that had belonged to Kaahumanu" and that "it was acknowledged on all hands that Victoria was the heir of Kaahumanu." Then follows the resolution and there is no other reference to the subject. The terms of the resolution and of the preamble expressly negative the view that private property was thereby taken. What the record of the council shows is that a private individual claimed the land as successor in interest to Kaahumanu, that the council conceded in the claimant's favor that she was the heir of Kaahumanu but declared that in spite of that admission the land was the property of the government and that the individual's claim was therefore "negatived" or denied. The resolution was a distinct assertion that the title was already in the government and that Victoria's claim could not be acquiesced in. This is further emphasized by two earlier resolutions of the Privy Council, also offered in evidence by the Territory. Under date of March 5, 1850, the record shows: "Mr. Lee

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brought forward his" (H. Swinton's) "application and the following resolution was passed: 'Resolved, that Pelekane in Lahaina, Maui, be not sold to H. Swinton as it is a place to which many historical associations are attached and which has already been set apart as a place not to be sold.'" On May 16, 1850, the proceedings were: "Mr. Armstrong brought forward the application of Mr. H. S. Swinton to lease a piece of ground in Lahaina; Resolved that the lot Beretania in Lahaina applied for by Mr. Swinton be not sold or leased as the government may require it for Public Buildings." This language is irreconcilable with the view that the Council intended by the resolution of August 29, 1850, to condemn or take property which belonged to another. It tends to show that the Council believed that the property belonged to the government and refused to sell it or to lease it or to sanction any hostile claim to it.

So, also, the resolution of August 29, 1850, if it was intended as legislation, did not operate as a limitation of the power of the Land Commission to award the land to a private individual. The Privy Council did not possess legislative powers. *Territory v. Liliuokalani*, 14 Haw. 88.

The three resolutions were admissible, however, as evidence in support of the claim that Pa Pelekane was not at the date of the Land Commission award a part of the ahupuaa of Paunau and was not, therefore, by that award granted to Victoria Kamamalu. It is well settled that an award of the Land Commission, unappealed from as by the law then in force provided, is final and binding and not subject to collateral attack but it is not an infringement of this rule to ascertain, with or without the aid of extrinsic evidence as the case may be, and to declare the identity and the extent of the land described or named in the award. What were the ancient boundaries of the ahupuaa of Paunau is not necessarily the sole inquiry, in this respect, in the case at bar. It may be that Pa Pelekane, though originally a part of Paunau, was not at the date of the award a part of the ahupuaa. I concur in what is said in the opinion of the chief

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justice on this branch of the case and with reference to the admissibility of the three resolutions, the evidence of claim, occupation and use by the government and other evidence as tending to throw light on the issue of whether or not Pa Pelekane is still unawarded land.

I concur also in the views expressed by the chief justice relating to judicial notice of the laws of Hawaii enacted prior to annexation and of the principal facts of Hawaiian history, and to the admissibility of official records preserved in the government archives; in the rulings in detail concerning the erroneous exclusion of other evidence specifically referred to; in the views that the examiner's opinions are not evidence upon a trial of the issues in a contested case, that evidence (more than a scintilla) was offered by the Territory tending to show (a) that Pa Pelekane was unawarded land and (b) that as to certain parts at least of Pa Pelekane title if it had ever passed by the award, had been acquired by the government by adverse possession, and that petitions for registration are amendable so as to conform to proof of title of a part only of the land claimed; and in the conclusion that a new trial should be granted.

CONCURRING OPINION OF DE BOLT, J.

As to the disposition of the question of eminent domain I concur in the views as expressed by Mr. Justice Perry. In all other respects I concur in the opinion of the chief justice.

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YOUNG CHUN, DOING BUSINESS AS YE LIBERTY
THEATRE, v. BLONDIE ROBINSON.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED JULY 15, 1912.

DECIDED JULY 19, 1912.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

EQUITY—*injunction bond—counsel fees—costs.*

Counsel fees, as well as costs and other charges or damages, paid or sustained to obtain a dissolution of a restraining order are damages directly and proximately resulting from the issuance of the injunction are recoverable; and such damages may be assessed and awarded in equity, it being within the sound discretion of the circuit judge as to whether or not in each particular case he will himself dispose of the matter or leave the parties to an action at law.

Id.—*bond, form and substance of.*

There is no specific statutory provision relating to injunction bonds. The form and substance of the bond to be filed must necessarily be such as the well established principles of equity require, the determination of which, as well as the application, are matters resting in the sound judicial discretion of the circuit judge.

OPINION OF THE COURT BY DE BOLT, J.

The complainant having filed his bill in equity praying that the respondent be restrained from performing as a comedian in any theater in the City and County of Honolulu, other than "Ye Liberty Theatre," and a writ of temporary injunction having issued restraining the respondent as prayed for, and the complainant having duly executed and filed a bond of indemnity in the penal sum of one thousand dollars whereby he undertook "to fully indemnify" the respondent "for all costs and damages which" the respondent "may be required to pay or sustain, not exceeding the penalty of his bond, if it should be finally adjudged that said temporary injunction was wrongfully, oppressively and maliciously sued out," and the injunction, on appeal to this court (ante 70), having been dissolved and the cause remanded to the circuit judge, the respondent thereupon filed and present-

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ed his motion for assessment and award, under the bond, of costs as follows: Attorneys' fees, \$250; costs, \$38.20; actual damages, \$120; punitive damages, \$591.80—making a total of \$1000.

At the argument on the motion to allow attorneys' fees, costs and damages, the respondent waived his claim to actual and punitive damages, and only asked for attorneys' fees and costs. The circuit judge in his decision upon the matter thus before him said:

"In my opinion the words in the bond" (obviously referring to the words, "wrongfully, oppressively and maliciously") "are synonymous and are not to be taken in the disjunctive.

"I fear that I have no power, and should not attempt to exercise a discretion; it seems to me entirely a matter of law and for a law court, and I am therefore under the necessity of refusing to consider the motion to allow attorneys' fees, costs and damages in this case."

The respondent appeals from that decision, his contention being that the circuit judge, although having power to consider the motion and award counsel fees and costs he declined to proceed or exercise any power in the matter.

The complainant contends, however, that the circuit judge in his decision, as quoted, denied the respondent's motion, thereby disallowing the attorneys' fees and costs, which, as he claims, was an exercise of judicial discretion in the matter and from which ruling no appeal lies.

As we read the decision of the circuit judge, he did not rule upon the motion, but refused to consider it on the ground that he had "no power and should not attempt to exercise a discretion" in the matter. He said, "it seems to me entirely a matter of law and for a law court, and I am therefore under the necessity of refusing to consider" the motion. It is clear that he did not attempt to exercise any power in the matter before him; and it is equally clear that he refused to attempt the exercise of any power therein on the ground that he did not possess it. The ruling of the circuit judge that he was without power

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to consider the motion and for that reason refused to consider it, was clearly erroneous. That he had the power to consider the matter, if he chose to exercise it, is beyond question.

It is the established rule in this jurisdiction that counsel fees, as well as costs and other charges or damages, paid or sustained to obtain the dissolution of a restraining order are damages directly and proximately resulting from the issuance of an injunction under circumstances like those in the case at bar and are recoverable. Such damages may be assessed and awarded in equity, it being within the sound discretion of the circuit judge as to whether or not in each particular case he will himself dispose of the matter or leave the parties to an action at law. See *Yick Wai Co. v. Ah Soong*, 13 Haw. 378, 384; *Rubenstein v. Hackfeld & Co.*, 18 Haw. 126; *Middleditch v. Kalaniana'ole*, 18 Haw. 272, 277.

As to the form of the bond the respondent contends that the words contained therein, namely, "if it should be finally adjudged that said temporary injunction was wrongfully, oppressively and maliciously sued out," are surplusage. He argues that section 1716, R. L., applies, and that this statute only requires, as a condition precedent to the issuance of an injunction, that a bond shall be filed "conditioned for the reimbursement to the defendant of all costs, charges and damages sustained by him in consequence of the suit, in case the plaintiff fail to sustain his action," and that this condition which should have been incorporated is included in the bond by contemplation of law, while that which is not required by the statute is excluded as surplusage. The statute referred to relates only to cases "in which process of constraint to the property of a defendant is prayed for," and, obviously, has no application whatever to cases like the one now before us. Indeed, there is no specific statutory provision relating to bonds such as the one now under consideration. The form and substance of the bond to be filed must necessarily be such as the well established principles of equity require, the determination of which, as well as the application,

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are matters resting in the sound judicial discretion of the circuit judge.

The respondent also contends that the words, "wrongfully, oppressively and maliciously," contained in the bond, are not synonymous and are to be read disjunctively. We do not deem it necessary to say at this time whether these words are synonymous or not, but in our opinion they are not to be read disjunctively. We must take the bond as we find it. The respondent had an opportunity to object to it after it was filed and having failed to do so he is now bound by its terms and conditions. There is nothing in the language of the bond to indicate that the word "and" was used in the sense of "or."

The decision appealed from is reversed on the ground that the circuit judge held that he was without power to proceed in the matter, and the case is, therefore, remanded to the circuit judge for further proceedings not inconsistent with this opinion.

W. B. Lymer (*Thompson, Wilder, Watson & Lymer* on the brief) for complainant.

N. W. Aluli (*J. A. Magoon* with him on the brief) for respondent.

JOSEPH PAIKO, CATHERINE K. PAIKO, JOSEPH PAIKO, JR., AND MARY K. PAIKO v. THE RIGHT REVEREND LIBERT H. BOEYNAEMS, BISHOP OF ZEUGMA.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED JULY 15, 1912.

DECIDED JULY 19, 1912.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

EQUITY—*suit to quiet title.*

A bill in equity cannot be maintained as a bill of peace to quiet title in the absence of an averment that the complainant has established his title through litigation at law.

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SAME—suit to remove cloud on title.

A bill in equity cannot be maintained as one to remove a cloud on title to land where the alleged cloud consists merely of verbal assertions of a pretended claim.

SAME—jurisdiction to construe wills.

A court of equity has no jurisdiction to construe a will where no trust is involved and the claims of the parties are of strictly legal interests in land.

OPINION OF THE COURT BY ROBERTSON, C.J.

The complainants exhibited their amended bill in equity to a circuit judge of the first judicial circuit, the principal facts set forth therein being as follows: That one Manuel Paiko died at Honolulu on or about the 1st day of April, 1890, leaving a will which was thereafter duly admitted to probate, a copy thereof being made part of the bill; that the testator left surviving him a widow, since deceased, also a son, Joseph Paiko, and a grandson, Joseph Paiko, Jr., complainants; that among the properties owned by the testator at the time of his death were certain premises situate at the corner of King and Maunakea streets, in Honolulu, and a piece of land at Kuliouou, Oahu; that ever since the death of the testator his said son has been and now is in possession of said premises at the corner of King and Maunakea streets, and that said son and grandson claim an estate of inheritance in said premises under and by virtue of a certain provision contained in the will; that ever since the death of the testator his said grandson has been and is now in possession of said land at Kuliouou claiming ownership of the same in fee simple by virtue of a certain other provision contained in the will; that the respondent "pretends to claim an interest in the property," referring to both premises above mentioned, "under the seventh clause of said will, but your petitioners have no knowledge or information as to the nature of said claim, and as to whether the said respondent claims such interest as trustee of the Roman Catholic Church, as successor to said Bishop Her-

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man, as executor of said will, or otherwise;" that said pretended claim is unjust and against complainants' rights, and constitutes a cloud on the title to said lands; that the complainants desire to sell or mortgage said lands but are unable to do so for a reasonable sum because of the said claim of the respondent; and that unless the cloud upon the title be removed and complainants' title in the property be quieted the complainants will suffer irreparable harm and injury. The bill prays that the respondent be required to appear and answer and to set forth the exact nature and kind of his pretended claim in or to said property; that Joseph Paiko and Joseph Paiko, Jr., be adjudged to have an estate in fee simple in the premises at the corner of King and Maunakea streets; that Joseph Paiko, Jr., be adjudged the owner in fee simple of the land at Kuliouou; that said respondent be adjudged to have no interest in the property of the estate of Manuel Paiko, deceased; for an injunction commanding the respondent to refrain from asserting or claiming any interest in said lands; and for general relief. The respondent demurred to the bill on several grounds of which it will be necessary to notice only those which question the sufficiency of the allegations of the bill and challenge the jurisdiction of a court of equity in the premises. The complainants have appealed from a decree sustaining the demurrer and dismissing the bill.

The bill cannot be sustained as a bill of peace to quiet title since it has not been made to appear that the complainants have established their title through litigation at law. Counsel for the appellants confidently relies on the case of *Holland v. Challen*, 110 U. S. 15, as being a controlling authority for the maintenance of the present bill. In that case it was held that a statute of Nebraska which provided that "an action may be brought and prosecuted to final decree, judgment or order by any person or persons, whether in actual possession or not, claiming title to real estate, against any person or persons who claim an adverse estate or interest therein, for the purpose of determining such estate or interest and quieting the title to such

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real estate," had the effect of enlarging, in that State, the equitable rights of parties claiming the legal title to real property where there is no plain, adequate and complete remedy at law, and that such enlarged rights would be recognized and enforced in the courts of the United States. But there is an important difference between the Nebraska statute and that of this Territory relating to actions to quiet title to land. Section 2085 of the Revised Laws provides for the bringing of such actions in the *circuit courts*. And it has uniformly been held that it left untouched the jurisdiction of the circuit judges in equity. *Kahoiwai v. Limaue*, 10 Haw. 507; *Flores v. Maka*, 11 Haw. 512; *Ahmi v. Ashford*, 12 Haw. 12. The case of *Holland v. Challen* does not support counsel's contention.

Nor can the bill be sustained as a bill *quia timet* to remove a cloud upon title because the existence of such a cloud is not averred. The allegations that the respondent has asserted a pretended claim to the property which prevents the complainants from mortgaging or selling the lands for a reasonable sum do not show a cloud upon the complainants' title to the lands. The term "cloud on title" is defined as "an outstanding claim or incumbrance which, if valid, would affect or impair the title of the owner of a particular estate, and which apparently and on its face has that effect, but which can be shown by extrinsic proof to be invalid or inapplicable to the estate in question." 6 A. & E. Enc. Law (2nd ed.), 149. Mere verbal assertions of ownership are not regarded as clouds upon title. *Devine v. Los Angeles*, 202 U. S. 313, 334; *Charman v. Charman*, 18 Haw. 415. The inference to be drawn from the bill in this case is that the "pretended claim" of the respondent has only verbally been asserted. Clearly, therefore, the claim does not constitute a cloud on complainants' title. The case stated by the bill in the case at bar is no stronger than was that of the complainants in the *Charman* case, where it was held that equity has not jurisdiction to declare a plaintiff's title and to remove a cloud upon it created by the assertion of an adverse claim followed by acts of

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trespass and annoyance to the plaintiff, where the respective claims depend upon the settlement of a legal controversy under a will. The present case is governed by the principle laid down in that case.

It would seem that the real object of the bill was to obtain a construction of the will of Manuel Paiko. We hold, however, in accordance with the great weight of authority, that a court of equity has no jurisdiction to construe a will where, as here, no trust is involved and the claims of the parties are of strictly legal interests in land. 1 Underhill on Wills, Sec. 455; 3 Pomeroy's Eq. Jur. (2nd ed.) Sec. 1156.

Decree affirmed.

J. Lightfoot for complainants.

Larnach & Robinson for respondent.

HENRY WATERHOUSE TRUST COMPANY, LIMITED,
v. JOHN D. PARIS.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED JULY 17, 1912.

DECIDED JULY 30, 1912.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

BOND—right of action—happening of contingency.

In an action by the assignee of the executors of W. upon an undertaking to hold the executors harmless from a certain judgment, a request addressed by the executors to the plaintiff to pay the judgment being an essential element of plaintiff's case, it is immaterial whether the request originated with the executors or came from them by way of acceptance of a suggestion made by another.

BOND—defenses—failure of contingency to happen.

It is a good defense to such an action by the plaintiff that the payment of the judgment was not by the plaintiff or at the request

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of the executors but was by a third person purely in fulfilment of his duty under a separate and distinct written undertaking to hold the executors harmless.

EVIDENCE—*burden of proving happening of contingency named in bond sued on.*

In such an action the burden is upon the plaintiff throughout to prove the existence of all the facts which would cause the defendant's liability to accrue and includes the duty to prove, among other things, payment of the judgment under such circumstances that in accordance with the law the rights of the executors as against the defendant survived and were transferred to the plaintiff.

OPINION OF THE COURT BY PERRY, J.

This case has been before this court on exceptions to an order granting a nonsuit at the first trial and a statement of the allegations of the declaration is contained in the opinion sustaining the exceptions. (Ante. p. 46.) At the second trial the verdict was for the plaintiff.

Undisputed evidence was introduced proving the following facts: that on September 22, 1904, the defendant received from the Henry Waterhouse Trust Company, Limited, trustee under a deed of trust, the sum of \$3079.11 for certain rents and thereupon entered into the undertaking declared on that "in the event that A. B. Wood or the Estate of Henry Waterhouse, deceased, shall be held liable by judgment of a court of competent jurisdiction on account of any claim or demand arising out of a certain redelivery bond executed by Clinton J. Hutchins, as principal, and said A. B. Wood and said Henry Waterhouse, as sureties, in a suit pending in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, between W. W. Bierce & Company, Limited, plaintiff, and Clinton J. Hutchins, trustee, et al., defendants" he would "save and hold harmless * * * said A. B. Wood and the said Estate of Henry Waterhouse, deceased, therefrom to the extent of" the sum received; that on March 29, 1911, final judgment in favor of the plaintiff was entered in the Bierce case; that on April 12, 1911, the judgment

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with interest to date of payment was paid by check of the plaintiff in the sum of \$36,074.56 and that on the following day a satisfaction piece was filed in the action; that concurrently with or immediately preceding the delivery of the check to the attorney for W. W. Bierce, Limited, the executors of the will of Henry Waterhouse executed and delivered to the plaintiff an assignment of "all and every claim or right of action which said executors and said estate have against" the defendant arising under the obligation above referred to; that immediately after the payment of the judgment counsel for the executors received from the attorney for W. W. Bierce, Limited, the satisfaction piece for filing; that on November 11, 1907, J. B. Castle, reciting that Clinton J. Hutchins had transferred to him certain claims against Wm. W. Bierce, Limited, agreed in writing "to hold the said C. J. Hutchins and his sureties in said suits" (including the case of Bierce v. Hutchins, and others) "harmless from any judgment obtained in the said suits;" and that on November 27, 1907, Castle addressed a letter to the executors of the will of Henry Waterhouse assuring them that the agreement of November 11, 1907, was made for their benefit and that "the executors of Henry Waterhouse * * * were intended to be included within the term 'sureties' therein used."

The president of the plaintiff corporation, referring to the payment of the \$36,000 by his company, testified that while he had not attended to the details of the transaction he "was aware of what was going on" and that "this money was advanced for the account of J. B. Castle for the Kona Development Company; * * * it was paid to the account of James B. Castle * * * All I know is that it was for his account and charged to his account." In connection with the other evidence in the case this testimony, even though there was none other to the same effect, required a submission to the jury of the question whether in making the payment the plaintiff acted merely as the agent of J. B. Castle, in other words, whether the payment was that of J. B. Castle in pursuance of the terms of his undertaking

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entered into in 1907, the contention of the defendant being that the payment was procured by Castle purely as a volunteer in so far as the executors were concerned.

By cross-examination of Albert Waterhouse, one of the executors, and other witnesses of the defendant, the plaintiff elicited evidence tending to show that both before and after the rendition of the Bierce judgment the executors endeavored to prevail upon J. B. Castle to pay the judgment in performance of his agreement and letter and that Waterhouse finally acquiesced in the suggestion advanced by D. L. Withington, who was then acting as attorney for J. B. Castle as well as for the Waterhouse Trust Company, that perhaps an arrangement could be made whereby some one other than J. B. Castle would consent to pay the judgment and take an assignment from the executors of their claims against the defendant and others similarly situated and requested Withington to "try to make some such arrangement;" that through Withington's and J. B. Castle's efforts plaintiff agreed to make the payment and take the assignment, J. B. Castle in turn agreeing to reimburse plaintiff in the sum of \$30,000 and guaranteeing payment of the balance to it provided it was unable to collect it from Paris and the others named in the assignment.

There was also testimony by Albert Waterhouse, the only executor in Honolulu at that time and who also acted for his co-executor, that the executors did not request the plaintiff to pay the judgment save as might be inferred from the language and fact of the assignment itself.

In the former opinion it was held that the assignment on its face is susceptible of the inference that the payment was at the request of the executors. At the second trial the parties and the presiding judge proceeded on the assumption, and we think correctly, that this inference was rebuttable by extrinsic evidence. We have also held that if the payment was by the plaintiff and at the request of the executors the defendant is liable in this suit upon his undertaking. The request may be either ex-

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press or implied. It is immaterial whether it originated with the executors or came from them by way of acceptance of a suggestion made by another. If in pursuance of the suggestion of one of the attorneys the latter was authorized by the executors to endeavor to prevail upon a third person to pay the judgment and to take an assignment from the executors of their claim against Paris and if thereafter, as to a part of the amount of the judgment in pursuance of such an authorization, an understanding was arrived at to the effect that the plaintiff would pay the judgment looking to J. B. Castle for \$30,000 unconditionally and for the balance primarily to the assigned claims and secondarily to J. B. Castle by way of guarantee only and the payment was made by the plaintiff and the claims assigned, the plaintiff was thereby substituted for the executors and the defendant is liable in this action. On the other hand, if the negotiations, whatever they were, between J. B. Castle and the plaintiff, were conducted without the authorization or acquiescence of the executors,—if in other words the payment was made for or at the solicitation of J. B. Castle purely in fulfilment of his duty under the undertaking of 1907, without any request, direct or indirect, by the executors for payment by the plaintiff, the defendant is not liable. If it was J. B. Castle who in reality paid the judgment, purely in fulfilment of his duty under the undertaking of 1907, the plaintiff acting merely as his banker or financial agent, it is immaterial whether he did so of his own accord or in consequence of a suggestion or request addressed to him by the executors, and in that event the defendant would not be liable in this case.

On this last mentioned point the court charged the jury, "if, on the other hand, you find that the judgment was paid by the plaintiff at the request of a third party and at the time the funds were advanced for such payment that the repayment to the plaintiff of a portion of said funds by said third party was conditioned upon a failure of the defendant to pay in accordance with the terms of the receipt and that said condition was but a

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guarantee of repayment in the event of such failure, then such payment and guarantee would not, in my opinion, constitute a defense to this action." This instruction,—the remainder of the charge was not such as to cure the error—did not state the law with sufficient clearness and left it open to the jury to find for the plaintiff if they found the fact of a guarantee of the amount involved by J. B. Castle irrespective of whether the executors expressly or impliedly requested the payment by the plaintiff.

(Concerning the burden of proof the only instruction given by the presiding judge was the following: "In my opinion the burden of proof is upon the plaintiff to prove all the material facts alleged in its complaint. If you believe that such burden has been sustained by a preponderance of the evidence, a *prima facie* case has been made out by the plaintiff, and I am then of the opinion that the burden of establishing payment or extinguishment of the obligation is on the defendant." The instruction was erroneous. It is not entirely clear whether in the last portion the court intended to refer to payment or extinguishment of the defendant's obligation now sued upon or to payment or extinguishment of the obligation of the executors to pay the judgment in the Bierce case. If the reference was to payment of the obligation sued on the instruction was wholly inapplicable for there is no claim by the defendant in this case that he has paid or otherwise satisfied his obligation. His sole contention is that the facts do not exist which would render him liable. On the other hand, if the reference was to payment of the Bierce judgment the instruction does not state the law. The burden was not on the defendant to prove payment or other extinguishment of the liability of the executors under the Bierce judgment. The burden was upon the plaintiff throughout to prove the existence of all the facts which would cause the defendant's liability to accrue and this included the duty to prove, among other things, payment of the judgment under such circumstances that in accordance with the law above declared the

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rights of the executors as against Paris survived and were transferred to the plaintiff.

The exceptions which have been considered are sustained and a new trial is granted.

D. L. Withington (*Castle & Withington* on the brief) for plaintiff.

R. B. Anderson (*Kinney, Prosser, Anderson & Marx* and *Smith, Warren & Hemenway* on the brief) for defendant.

TERRITORY OF HAWAII *v.* HOP KEE.

RESERVED QUESTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED JULY 17, 1912.

DECIDED JULY 31, 1912.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

MUNICIPAL CORPORATIONS—*validity of health ordinance.*

Section 1 of Ordinance No. 30 of the city and county of Honolulu, making it unlawful to expose for sale or to sell from any stock in trade within the municipality any game meat, poultry meat, butcher's meat, fish or sea food unless the same shall be protected from dust, dirt, and from contact of and contamination by flies and other insects and from promiscuous handling, and section 4 of said ordinance making it the duty of certain officers to enforce the provisions of the ordinance, and authorizing them to have access to any market, stall, store, stand or other place mentioned in the ordinance for the purpose of inspection, held to be within the power of the city and county of Honolulu to enact; held also that the provisions of those sections do not take property without due process of law; are not unreasonable, uncertain or indefinite or impossible of enforcement; and do not involve a void delegation of legislative power.

SAME—*sufficiency of charge for violation of ordinance.*

A charge of violating section 1 of said ordinance, in that the defendant "unlawfully and wilfully did expose for sale and sell

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certain foodstuffs, to wit, meat," is not demurrable on the ground that it does not designate the kind of meat which the defendant is accused of having exposed for sale and sold.

OPINION OF THE COURT BY ROBERTSON, C.J.

The defendant appealed to the circuit court of the first circuit from a conviction by the district magistrate of Honolulu upon the following charge: "That one Hop Kee, at Honolulu, City and County of Honolulu, Territory of Hawaii, during two weeks last past prior to and including the 4th day of December, A. D. 1911, unlawfully and wilfully did expose for sale and sell certain foodstuffs, to wit, meat, in those certain stalls, being stalls Nos. 2, 3, 4, 5, 6, situate in the fishmarket in said Honolulu, without the same being then and there protected from dust, dirt, and from contact and contamination by flies and other insects contrary to the provisions of section 1 of City and County ordinance No. 30."

The defendant demurred to the charge on several grounds which raise questions concerning the validity of ordinance No. 30, and the sufficiency of the charge. The circuit court reserved the points raised for the consideration of this court.

It is contended that the ordinance is in conflict with the Fifth and Fourteenth Amendments of the Constitution which declare that no person shall be deprived of property without due process of law; that it is unreasonable in its provisions, and it is practically impossible to comply with and enforce the same; that it is not a reasonable exercise of the police power; that it is void for indefiniteness and uncertainty; that it is beyond the power of the municipality to enact; and that it is a void delegation of legislative power in that it constitutes the city and county physician, the food, meat, fish and sanitary inspectors and police officers the judges of what shall be a sufficient protection from dust, dirt, promiscuous handling and contamination of meat, fish and foodstuff. And the demurrer sets up that the charge is insufficient in that it charges no violation of the

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ordinance in question; that it is so indefinite, vague and uncertain, that no valid judgment can be rendered under it against the defendant; and that it does not inform the defendant of the nature and cause of the accusation against him.

The ordinance is entitled, "An Ordinance providing for the protection of game meat, poultry meat, butcher's meat, fish and sea food, from dust, dirt, contact of and contamination by flies and other insects, and from promiscuous handling, and other contamination," and section 1 provides that "It shall be unlawful to expose for sale or to sell from any stock in trade within the City and County of Honolulu, Territory of Hawaii, any game meat, poultry meat, butcher's meat, fish or sea food unless such foodstuffs shall be protected from dust, dirt and from contact of and contamination by flies and other insects, and from promiscuous handling and other contamination."

The legislature has conferred upon the city and county of Honolulu power to enact all ordinances necessary for the protection of the health of the municipality and its inhabitants, expressly including matters of sanitation. Act 118, Sec. 23, Session Laws of 1907, as amended by Act 79, Sec. 2, and Act 99, Sec. 1, of the Session Laws of 1909. The validity of this legislation is not questioned. The control of local health and sanitary matters is one of the important powers commonly conferred upon municipalities. "The power of cities and towns to adopt ordinances and by-laws for the preservation and promotion of the health of their inhabitants has often been upheld as an exercise of the police power and is one of their most necessary and salutary powers." *Com. v. Cutter*, 156 Mass. 52, 54. With the growth of commerce and development of traffic with distant communities, and with the increase of population in trade centers, the importance of the subject increases, and modern experience shows that private convenience and individual freedom of action is required to yield to the public good in respects where formerly there was observed no necessity for legislative interference. The object of the ordinance in ques-

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tion, undoubtedly a beneficial one, has been clearly stated in its title, and the provisions contained in the ordinance, in so far as it is now necessary to examine them, seem adapted to further that object. In *State v. O'Connor*, 115 Minn. 339, a case which has been rather severely criticized by counsel for the defendant, but which we believe was well decided, and is in point, it was held that an ordinance providing that "all berries, cherries, dates and figs exposed for sale in any store, shop or building shall be protected from flies, and all fruits, berries and candies exposed for sale outside of a building or in any wagon or cart, shall be protected from both flies and dust," is not an unnecessary interference with private rights, and is not an unreasonable requirement or impossible of performance, and is not contrary to any constitutional provision. The court there said: "It is well settled that the police power extends to all matters where the general welfare, morals, and health of the community are involved, and the right to exercise the power, in the regulation of business affairs, has been so often determined by this court, that nothing would be gained by referring at this time to the decisions in detail. If the legislative authorities have the power to regulate the sale of cottolene, baking powder, farm and dairy products, to control butchers, the business of pharmacy, to enforce vaccination of school children, to regulate the smoke nuisance, and compel street car companies to sprinkle their tracks for the protection of the public health, then no question should arise as to the legislative power to protect fruits and candies from being exposed where they will accumulate the germ-laden dust of the streets or permit contact with flies. The fact that the enforcement of the ordinance may require some radical change in the method of conducting a business does not necessarily furnish a defense to its enforcement. A privilege long countenanced does not always amount to a personal right. It is a very convenient and perhaps effective method of advertising fruit to display it in front of a store on the street, in the view of the passer-by; but if, by its accumulation of dirt

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and germs, the health of the consumer is menaced, then certainly the police power may be invoked to take reasonable steps to abate this source of breeding disease, and, if necessary, may entirely deprive the vender of fruit of the privilege of exposing it in the open air. The ordinance is a movement in the right direction. It speaks for health and cleanliness, and every right-thinking person ought to be in sympathy with a movement of this kind."

Those observations apply with force to the case at bar.

The contention that the ordinance is indefinite and uncertain is based on the fact that the ordinance does not prescribe the method to be followed in protecting foodstuffs from dust, dirt and contamination. Counsel cites the case of *St. Louis v. Heitzberger Packing Co.*, 141 Mo. 375, 388, where it was said that "All valid ordinances must fix the duty or liability of the citizen by certain intelligible prescribed rules so that he may govern himself accordingly." The rule as to certainty in ordinances has been stated in a recent case in this language: "Ordinances must be so definite and certain as to leave no reasonable doubt as to what is intended, but their terms will not be so strictly construed as to defeat their purposes, if they are sufficiently definite to be understood with a reasonable certainty." *Smith v. New Albany*, 93 N. E. (Ind.) 73, 77. We think that the first section of the ordinance under review complies with the rule as laid down in the cases referred to. The duty required by it to be performed is definitely prescribed in clear terms, and that duty should readily be gathered by a person of ordinary intelligence to be the protecting, when exposed for sale, of the foodstuffs enumerated from dust and dirt and from contamination by insects and promiscuous handling. The rule as to defining statutory offenses is thus stated in 12 Cyc. 141, 142: "In creating an offense which was not a crime at common law, a statute must of course be sufficiently certain to show what the legislature intended to prohibit and punish, otherwise it will be void for uncertainty. But a penal statute is sufficiently cer-

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tain, although it may use general terms, if the offense is so defined as to convey to a person of ordinary intelligence an adequate description of the evil intended to be prohibited." It is not necessary to the validity of the ordinance that the particular method to be pursued in the performance of the duty should have been prescribed. We take it that the adoption of any reasonably effective method would constitute a compliance with the requirement. And it is not a tenable objection that the courts are ultimately to decide whether or not in a given case the duty imposed by the ordinance has been performed.

It is also contended that the ordinance is void because it contains a delegation to the courts of the power to fix the penalty for its violation, and that the municipality is without power to make such delegation. Section 23 of the municipal act provides that the board of supervisors shall have power to prescribe fines, forfeitures and penalties for the breach of any ordinance, but no penalty shall exceed the amount of five hundred dollars or six months' imprisonment or both. It is not necessary that an ordinance such as the one involved here should fix an exact and invariable penalty for its violation. The defendant cites the case of *Lambertville v. Applegate*, 73 N. J. L. 110, where it was held that "the determination of the penalty that will be likely to induce peddlers to take out the prescribed license or to deter them from pursuing their calling without one, is purely a legislative question, hence when the authority to prescribe such penalty is conferred upon a legislative body such body must itself fix the precise sum of such penalty." But the court in that case referred to the rule which applies to the case at bar in the following language: "Where the fixing of the amount of the penalty presents a judicial question arising from the circumstances of each case that calls for its imposition, the exercise of such right by a magistrate within limits prescribed by the legislative body of the municipality is not deemed a delegation by such body of its authority, but only a mode for its more effi-

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cient exercise." See also 2 Dillon Mun. Corp. (5th ed.) Sec. 613; 28 Cyc. 355.

The contention that the ordinance was beyond the power of the municipality to enact because in conflict with a regulation of the territorial board of health seems to have grown out of a misapplication of a provision of section 62, chapter 39 of the Session Laws of 1905, which applied to the counties and has since been amended. Section 23 of the municipal act of 1907, as amended by section 3 of Act 79 of the Session Laws of 1909, provides that no ordinance shall be held invalid on the ground that it covers a subject embraced in a statute of the Territory even though the two conflict. With the wisdom of permitting such a duplication of regulations this court has nothing to do. We find no merit in the defendant's contention on this point. *Territory v. Dondero*, 21 Haw. 19, 30. Nor can we sustain the claim that the ordinance involves a void delegation of legislative power by constituting certain executive officers the judges of what shall be a sufficient protection of the foodstuffs from dust, dirt and contamination. Section 4 of the ordinance provides that "It shall be the duty of the city and county physician, the food, meat, fish and sanitary inspectors and the police officers of the city and county of Honolulu to enforce the provisions of this ordinance, and for such purpose all of the said officials and officers shall, at all reasonable hours, have access to any market, market stall, store, stand, or other place herein mentioned, for the purpose of inspection." The authority so given to the officials named is, as stated, for the purpose of inspection. The duty assigned to them to "enforce" the ordinance means that the officers shall make complaint and cause the institution of legal proceedings whenever they find or believe that the ordinance is not being complied with. The section does not purport to constitute those officers the judges of the question whether the ordinance has been violated, and we see nothing in the provision to warrant the contention advanced in this connection. In *St. Louis v. Heitzberger Packing Co.*, supra,

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an ordinance declaring the emission into the open air of dense black or thick gray smoke within the limits of the city of St. Louis to be a nuisance was held void because in excess of the powers of the city under its charter. In reply to the charge that the ordinance was unreasonable in essaying in advance of any known device for preventing dense smoke from the soft coal mined in the vicinity and used in the city, to punish all who produce such smoke in any degree whatever, it was said that the ordinance was not enforced in all its strictness but much was left to the discretion of the inspectors. With reference to that argument the court said "then we have an unregulated official discretion which of itself renders the ordinance void, for it cannot be tolerated that the rights of a citizen in this state shall depend entirely upon the caprice of any official, high or low." This language, which counsel for the defendant quotes in his brief, has no application in the case at bar.

We have examined all the cases cited in the defendant's brief and find nothing in any of them that would justify us in declaring the ordinance in question to be void. We hold that the provisions of this ordinance, in so far as they have been assailed in this case, were within the power of the city and county of Honolulu to enact; that they do not deprive the defendant of his property without due process of law; that they are not unreasonable, uncertain, indefinite or impossible of enforcement; and that they do not involve a void delegation of legislative power.

The only point sought to be made in support of the objections raised to the form of the charge entered against the defendant is that the kind of meat the defendant is alleged to have exposed for sale and sold has not been specified. We think the charge is not demurrable on the ground urged. What kind of meat other than game meat, poultry meat or butcher's meat the charge might possibly refer to has not been suggested. The charge is sufficient so far as the point sought to be made is con-

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cerned. The defendant desiring the specification referred to might obtain it upon a motion for a bill of particulars.

The circuit court is advised that the demurrer should be overruled.

F. W. Milverton, Deputy City and County Attorney, for the Territory.

A. S. Humphreys for defendant.

TERRITORY OF HAWAII v. CHUNG NUNG.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED JULY 22, 1912.

DECIDED AUGUST 7, 1912.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

EVIDENCE—*circumstantial—inferences.*

In a case of circumstantial evidence, there being evidence of certain facts, if believed by the jury, from which facts inferences of guilt can reasonably be drawn by the jury, the verdict cannot be disturbed. In reaching its conclusion the jury is at liberty to accept and act upon the evidence consistent with the theory of guilt and to reject the evidence inconsistent therewith, provided the verdict returned is supported by evidence as to all the essential and material elements of the crime charged.

Id.—*admissibility of testimony.*

At the time the defendant was arrested the officers, for the purpose of making an examination of his person, directed him, but without the use of any force, or threats, or the holding out of any inducement, to remove a portion of his clothing, which he did without objection. The purpose of the examination thus made was to obtain proof of a physical fact, and not to compel the defendant to be a witness against himself. At the trial of the defendant testimony by one of the officers as to the result of the examination was admissible.

Id.—*admissibility of evidence.*

A statement in the nature of a confession made by a person

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while in jail and before any charge is entered against him, made in the presence of the deputy city and county attorney and police officers, and without the advice of counsel, but made freely and voluntarily, is admissible in evidence.

OPINION OF THE COURT BY DE BOLT, J.

The defendant was indicted on February 2, 1912 (ante p. 66), for the crime of carnal abuse of a female child under the age of twelve years, alleged to have been committed by him on December 30, 1911, upon one Lili Ulii, otherwise known as Lili Kawai. The defendant was convicted and sentenced to imprisonment for life at hard labor. He brings the case here on exceptions.

The Territory relied for conviction upon evidence, as disclosed by the record before us, from which the jury could have found facts substantially as follows: That at the time the crime is alleged to have been committed the family, of which Lili was a member, resided at Kaalaea, district of Koolaupoko; that their home was at least a quarter of a mile from the nearest habitation and about the same distance from the public road; that the family consisted of Kane Kukikila and his wife, Lily Kane, and three foster children, a boy named Kukekila, about nine years of age, Lili, about four and one-half years of age, and another little girl, named Haole, about two years of age; that the defendant was employed as cook at a rice mill near the home of this family; that about noon, on December 22, 1911, when Kukekila returned to the premises (it does not appear where he had been), the defendant was with him, and they, the defendant and the boy, and the two little girls went into the house to eat poi, while Kane Kukikila and his wife went to a shed near by to wash and cook taro, in which work they were engaged during all the time the defendant and the children were in the house; that after they had finished eating poi, the defendant sat on a trunk and placed Lili on his lap astride his legs, her back to his face, and upon her expressing a desire to get down, he said, "no, by and bye;" that she was on the de-

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defendant's lap "a long time," as testified to by Kukekila, who, for the purpose of showing what he meant by "a long time," sat on the interpreter's lap a minute and a half; that neither Kane Kukikila nor his wife saw the defendant leave the premises, but nearly a half hour after they had seen him enter the house with the children, the two little girls ran down to the place where they were cooking taro, saying, "five cents, five cents," and on being asked, "where you get your five cents," they said, "from the pake;" that on December 30, 1911, the defendant again appeared at the home of these people, on which occasion Kane Kukikila was absent, but his wife and another woman were on the verandah in front of the house, a Chinaman, Su Suey, was at the side of the house pounding poi and the children were playing in the back yard; that the defendant spoke to Su Suey and passed on to the rear of the house where, while he was resting and eating some abalone under a tree (the location not being definitely shown by the evidence), Lili ran up to him and he gave her some of the abalone and took her on his lap, placing her astride his legs, facing him, with his arms around her; that the defendant returned from the rear of the house in about thirty minutes and left the premises by the same way he had gone in; that this little girl, Lili, on the occasions mentioned, had on nothing but a little dress and chemise—she never wore drawers; that the defendant, during the period including his visits to the home of these people and his relations with this little girl, had chronic gonorrhea, which, as he admitted, he had contracted from a Japanese woman sometime prior to his visits to these premises; that on or about January 10, 1912, it was discovered that Lili was suffering from venereal disease, and upon an examination by physicians it was found that she not only had gonorrhea of a most malignant type, but that her hymen was ruptured; that in the opinion of the examining physicians, while the rupture of the hymen may be the result of various causes, in the case of small girls the fact of gonorrhea being present tends to narrow the number of causes down to that of penetration.

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It does not appear that the defendant had any legitimate purpose in visiting the premises on the occasions mentioned. It is true that on the second occasion he was sent by his employer to turn on the water used in the rice mill, but it appears that his way would properly have been along the ditch and not through these premises over which there was no trail. It also appears that none of the family during the period from December 22 to December 30 had venereal disease.

The little girl, owing to her extreme youth, was not sworn as a witness. Neither did the defendant testify, and the evidence adduced on his behalf, so far as it was in conflict with the evidence of the Territory, was a matter exclusively within the province of the jury for consideration.

It is urged by counsel for the defendant that the evidence is not sufficient to sustain the verdict; that the testimony in the case, being purely circumstantial, is not inconsistent with every reasonable theory of innocence; that the jury was swayed by the eloquence of the city and county attorney; and that the verdict can only be accounted for on the ground of passion and prejudice.

The question for our determination, however, is, not whether we would or would not have convicted the defendant upon the evidence as disclosed by the record before us, but whether there was evidence sufficient to support the verdict as returned. In our opinion the evidence, when considered in connection with all the legitimate and reasonable inferences which the jury was warranted in drawing therefrom, was sufficient to support the verdict. The record fails to disclose any fact or matter tending to show that the jury was influenced by passion or prejudice. There was evidence, not direct it is true, but circumstantial, tending to establish the *corpus delicti*. The evidence tending to show that the defendant committed the crime charged was likewise circumstantial. There being evidence sufficient to go to the jury, it was exclusively within the province of the jury to determine the weight and effect of the evidence, to con-

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sider the conflicting theories of guilt and of innocence, and, finally, to determine from all the evidence, direct and circumstantial, including all reasonable and proper inferences to be drawn therefrom, whether the defendant was guilty as charged or not. In reaching its conclusion the jury was at liberty to accept and act upon the evidence consistent with the theory of guilt and to reject the evidence inconsistent therewith, provided that the verdict returned was supported by evidence as to all the essential and material elements of the crime charged.

Assuming, as we may, that this little girl of tender years was suffering from a loathsome venereal disease and that her hymen was also ruptured,—these facts,—viewed in the light of the expert opinions of the examining physicians, were reasonably sufficient to warrant the jury in finding that the child had been carnally abused, her physical condition being such that the jury could have reasonably inferred from the facts proven the ultimate fact of penetration by the male organ. To these facts let us add the further facts, namely, the diseased condition of the defendant, his visits to the premises, and his conduct with the little girl, and we then have a combination of facts, which, upon the sound principles of reason, satisfactorily sustain the verdict. These facts, it seems, were sufficient to satisfy the understanding and conscience of the jury. In cases of circumstantial evidence “what circumstances will amount to proof, can never be matter of general definition; the legal test is the sufficiency of the evidence to satisfy the understanding and conscience of the jury. On the one hand, absolute metaphysical and demonstrative certainty is not essential to proof by circumstances. It is sufficient if they produce moral certainty, to the exclusion of every reasonable doubt.” *Browning v. State*, 33 Miss. 47, 77.

In *Lee v. State*, 156 Ind. 541, 546, the court said: “Where the circumstantial evidence in a case is of such a character that two conflicting inferences may be reasonably drawn therefrom, one favorable to or tending to prove the guilt of the accused,

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and the other favorable to his innocence, then, under such circumstances, it is not within the province of the court to determine which inference ought to have controlled the jury."

Counsel for the defendant challenged the admissibility of the testimony of officer Apana, who was permitted to testify over the objection of the defendant that at the time of the arrest of the defendant, he and the chief of detectives, for the purpose of making an examination of the defendant's person, directed him to remove his trousers, which he did without objection, and that they then made the examination. It is urged that this was requiring the defendant to testify against himself. There is no evidence tending to show the use of any force, or threats, or the holding out of any inducement. The testimony, we think, was clearly admissible. The purpose of the examination was to obtain proof of a physical fact, and not to compel the defendant "to be a witness against himself." He was not required to say anything or to make any statement. It was held in *State v. Ah Chuey*, 14 Nev. 79, 33 Am. Rep. 530, a carefully considered case, that "no evidence of physical facts can, upon any established principle of law, or upon any substantial reason, be held to come within the letter or spirit of the Constitution." Wigmore's view is, that "it is not merely compulsion that is the kernel of the privilege, in history and in the constitutional definitions, but testimonial compulsion." 4 Wig. Ev., §§2263, 2265. See also *State v. Graham*, 41 So. 90, 91; *People v. Gardner*, 144 N. Y. 119, 127, 128; *State v. Jones*, 153 Mo. 457, 459; *O'Brien v. State*, 125 Ind. 38, 42.

It is also urged on behalf of the defendant that the "court erred in the reception of evidence before the *corpus delicti* was proven." There is no merit in this contention. The order of admission of testimony is a matter resting in the sound discretion of the trial court. Moreover, the record fails to show that the defendant at any time made any objection as to the order of proof.

While the defendant was in jail and before any charge was

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entered against him he was examined by the deputy city and county attorney, A. M. Brown, regarding his conduct with this little girl. The examination was conducted in the presence of officers McDuffie, Kellett, Apana and Akui. Officer Apana acted as interpreter. The defendant was informed as to Mr. Brown's official position and that he was there for the purpose of asking him questions. He was also informed that it was his privilege to answer the questions or not, "just as he felt;" that he was not to be coerced or intimidated, but that whatever answers he gave might be used against him. The defendant said he was "willing to tell the truth." What the defendant said on that occasion officer Apana was permitted to testify to at the trial over the defendant's objection, the substance of which we have set out in the statement of the case. Just before the examination of the defendant was begun his counsel called at the jail and claimed the right to advise the defendant as to his rights then as well as during the examination. Counsel was not permitted to advise the defendant nor was he permitted to remain during the examination. It is now urged that the testimony of officer Apana was not admissible, the contention being that the defendant, by reason of his situation, surrounded by police officers, and denied the advice of counsel, was not a free agent, and that his statement was not voluntary. We see no merit in this contention. There is no evidence tending to show the use of any force or threats, or the holding out of any inducement, or that he was intimidated by the presence of the officers or by the absence of his counsel. It does not follow that because the defendant made his statement in the presence of officers, or that his counsel was not permitted to remain and advise him as to his rights, that he was intimidated, or coerced, or that he did not make his statement freely and voluntarily. The facts disclosed bring the case clearly within the rule laid down in *Territory v. Matsumoto*, 16 Haw. 267. The testimony of the witness Apana was admissible. See *Hopt v. Utah*, 110 U. S. 574, 583, 587; *State v. Icenbice*, 126 Ia. 16, 20; *State v.*

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Wescott, 130 Ia. 1, 6; *Greer v. State*, 45 S. W. (Tex.) 12.

Upon the ground that the indictment alleged that the crime was committed on December 30, 1911, the defendant objected to the admission of evidence as to his visit to the home of the little girl on December 22, 1911. The evidence was properly admitted. Time was not of the essence of the crime charged and it was not necessary to prove it as laid. *Territory v. Crawford*, 18 Haw. 246; *Hardy v. United States*, 186 U. S. 224, 225, 226; *Palin v. State*, 38 Neb. 862, 865; 1 Bishop's New Cr. Proc., §§386, 400.

The defendant also contends that the court erred in not granting a new trial on the ground of newly discovered evidence. The so-called newly discovered evidence was that the defendant did not have gonorrhea.

It appears that at the defendant's request he was examined on or about January 31, 1912, by Dr. C. B. Wood. The defendant, in support of his motion for a new trial, and the Territory, in opposition thereto, each filed an affidavit by Dr. Wood as to his examination of the defendant. Upon reading those affidavits it appears that Dr. Wood was not "willing to swear that the defendant did not have gonorrhea." The evidence of Dr. Wood was cumulative, and not so favorable to the defendant as the evidence of Dr. Moore, who made an examination of the defendant and testified on his behalf at the trial. Dr. Moore, when asked if the defendant had gonorrhea, testified that "the probability is that he did not have it."

It appears that Dr. Sinclair, who was called as a witness by the Territory, and who examined the defendant before either Dr. Wood or Dr. Moore examined him, did not hesitate to say that the defendant had "chronic gonorrhea."

The exceptions are overruled.

J. W. Cathcart, City and County Attorney, for the Territory.

Lorrin Andrews (*Eugene Murphy* with him on the brief) for defendant.

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MARY JOSEPHINE HATTIE BANNISTER v. MARY N. LUCAS.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED APRIL 15, 1912.

DECIDED AUGUST 10, 1912.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

PAYMENT—*burden of proof.*

Payment and counter-claim are affirmative defenses and the burden is upon the party pleading them to prove them by a preponderance of the evidence.

TRIAL—*instructions to jury—comment on evidence.*

An instruction given by a trial judge to a jury from which it may reasonably be inferred that the judge regards certain material evidence as unworthy of credence or of less weight than other opposing evidence is a comment on the character, strength and credibility of the evidence, and the giving of such an instruction is a violation of section 1798 of the Revised Laws. The error is not cured by an instruction that the judge had "no right to comment upon the testimony nor to make any findings of fact."

CONSTITUTIONAL LAW—*Seventh Amendment—trial by jury.*

Section 1798 of the Revised Laws, providing that "the judge * * * shall in no case comment upon the character, quality, strength, weakness, or credibility of any evidence submitted, or upon the character, attitude, appearance, motive or reliability of any witnesses sworn in a cause; provided, however, that nothing herein shall be construed to prohibit the court from charging the jury whether there is or is not evidence (indicating the evidence) tending to establish or rebut any specific fact involved in the cause," does not impair the right of trial by jury, and does not contravene the Seventh Amendment of the Constitution of the United States.

OPINION OF THE COURT BY ROBERTSON, C.J.

(Perry, J., Dissenting).

The plaintiff obtained judgment against the defendant in an action upon a promissory note, and the defendant brings the case to this court upon exceptions which present certain questions involving the propriety of the instructions given to the

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jury by the judge who presided at the trial. We refer to the dissenting opinion of Mr. Justice Perry for a statement of the case setting forth the testimony and the instructions excepted to. We concur in the views there expressed with reference to the burden of proof being upon the party pleading payment or a counter-claim to prove them by a preponderance of the evidence. We also adopt the view that the judge's charge to the jury transgressed, in the respect pointed out, the provision of section 1798 of the Revised Laws which prohibits the trial judges from expressing an opinion to the jury upon the weight of the evidence adduced upon the trial of any case. The point raised by counsel for the plaintiff that that section of the Revised Laws is unconstitutional remains to be considered. That section was originally section 1 of chapter 56 of the Session Laws of 1892. Though enacted several years prior to the annexation of these islands to the United States and in connection with a system of trial by jury which in several respects did not conform to the common law of England or the requirements of the Constitution of the United States, it was not one of the laws expressly repealed by the Act organizing the Territory of Hawaii, and we think the presumption that it is constitutional prevails. It is our duty to sustain its validity unless thoroughly convinced of its invalidity. We are not so convinced. That portion of the section which is claimed to be in conflict with the Seventh Amendment of the Constitution provides that "The judge * * * shall in no case comment upon the character, quality, strength, weakness or credibility of any evidence submitted, or upon the character, attitude, appearance, motive or reliability of any witness sworn in a cause." The clause is subject to the proviso "that nothing herein shall be construed to prohibit the court from charging the jury whether there is or is not evidence (indicating the evidence) tending to establish or to rebut any specific fact involved in the cause." If the statute is open to more than one construction that construction which renders it free from constitutional objection, if available,

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must be adopted. The first reported case dealing with this provision is *Republic v. Pahu*, 10 Haw. 74, decided in 1895. It was there said, "This Act restricted the powers formerly held and exercised by the judge in instructing the jury and commenting on evidence and witnesses, and throws the whole burden upon the jury to weigh the evidence and credibility of witnesses without assistance from the court and generally their verdict must stand unless it clearly appears that they, the jury, have abused their powers and judgment, and could not have based their verdict upon the evidence." In *Republic v. Ah Ping*, 10 Haw. 459, the defendant was convicted upon a charge of larceny. It appeared that a witness had testified that on the morning after the theft the defendant had told him that a twenty-dollar piece and some silver had been stolen. The complaining witness testified that he had said nothing to the defendant about a twenty-dollar piece. The court in charging the jury said that if they believed that the defendant made the statement attributed to him, it "needs to be accounted for" as it had "a tendency to prove that the defendant was the one who stole the money." The jury were also instructed to acquit the defendant if upon the whole evidence in the case they were not convinced beyond a reasonable doubt of the defendant's guilt. This court overruled the exception to the charge saying, "We think, however, that although a part of the instruction may go too far taken by itself, the instruction as a whole comes within the proviso in the latter part of the section above quoted, 'that nothing herein shall be construed to prohibit the court from charging the jury whether there is or is not evidence (indicating the evidence) tending to establish or to rebut any specific fact involved in a cause.'" In *Republic v. Kapea*, 11 Haw. 293, upon an indictment for murder in the first degree, an instruction to the jury that under the evidence they should find a verdict of guilty as charged or of not guilty was held proper and authorized under the proviso contained in the statute. In *Territory v. Yoshikawa Dengiro*, 15 Haw. 64, this court sus-

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tained an exception to an instruction which was held to be unfair. It was there said, "It is contended by the attorney general that the court had a right to make a summary of the evidence to the jury. This may be true but a summary that only considers the evidence of one side and totally ignores that of the other cannot be said to be a fair summary." And included in a quotation there made from an Ohio case we find this statement: "We assume it to be the law, that, while it is not, in this state, the duty of the trial judge to sum up the evidence to the jury, yet it is not improper to do so providing it is fairly done, and all the material evidence on both sides is fairly presented." See *Kaleikini v. Waterhouse*, 19 Haw. 359, 361, 362; also *Lyman v. Hilo Tribune*, 13 Haw. 453, 456. In *re Notley Will*, 15 Haw. 700, decided June 3, 1904. It was there held that the statute does not prevent a trial judge from directing a verdict when there are no facts shown upon which the jury could properly base a verdict. In that case, for the first time, a suggestion of the possible unconstitutionality of the provision as to the judge's commenting on the evidence was made. In *Territory v. Schilling*, 17 Haw. 249, where it was held that a certain comment by the court upon the evidence was not sufficient to cause a reversal of the judgment, it was said, "We do not think, however, that the remark of the court concerning this testimony, although perhaps open to criticism, is likely to have affected the result or requires a reversal of judgment. If the statute required, as we do not think it does, a reversal of judgment for any comments whatsoever made by the court upon the evidence, then it would be requisite to consider whether the statute is constitutional in limiting the right of a common law trial by jury." In *Territory v. Kawano*, 20 Haw. 469, it was held that remarks and instructions of the court to the jury which are argumentive comparisons relative to the credibility of witnesses, commending one and disparaging the other, their testimony being vital and in conflict, constitute reversible error.

The foregoing cases show that while the statute has been

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viewed with appropriate strictness with respect to its prohibition of the trial judges from commenting upon the evidence, that part of it which authorizes the court to instruct the jury whether there is or is not evidence tending to establish or rebut any specific fact involved has been given a liberal operation. Comment on the evidence such as would be unlikely to affect the verdict has been held not violative of the statute, and the intimation (in the *Yoshikawa Dengiro* case) that the statute does not prevent the trial judge from summing up the evidence was so strong as to practically amount to a ruling. We think it may properly be said, therefore, that the statute does not preclude the judge presiding at the trial of a case from stating or summing up the evidence, or portions of it, and explaining to the jury its bearing upon the questions of law involved, and thus illuminating his instructions as to the law of the case and making clear the actual issues, provided such statement is perfectly fair and impartial and does not disclose to the jury the judge's opinion as to any controverted fact, or the views entertained by him as to the weight of any particular evidence or the credibility of any individual witness. An exhaustive review of the decisions of other courts under statutes similar to ours is not possible because the statutes of many of the States are not at hand, but it appears to be generally held that a statute or constitutional provision which merely forbids comment upon the evidence and witnesses does not prohibit the judge from summing up the evidence. See 1 Blashfield, Instructions to Juries, Sec. 53; 38 Cyc. 1653, 1654; *Com. v. Barry*, 9 Allen 276, 279; *Com. v. Larrabee*, 99 Mass. 413, 416; *Plummer v. Boston Elevated Railway*, 198 Mass. 499, 515; *State v. Day*, 79 Me. 120, 124, 125.

Apart from the question of the validity of the statute from a constitutional standpoint the court is not concerned with the policy of the legislation under review. There is room for a difference of opinion on the question whether the proper administration of justice is furthered by the enactment of a statute

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such as ours. History records the struggle which was long maintained in England in behalf of the independence of the jury. It will hardly be denied that the giving of the trial judge's opinion as to the evidence and facts must have great weight, and, sometimes, controlling weight, with the jury even though they be instructed that they are the sole judges of the facts. It may readily be conceived that in some cases, where the evidence is conflicting and the question is a close one, jurors are likely to surrender their own opinions to that of the judge. On the other hand, it has been contended with much force that the jury, composed of men unaccustomed to sifting and weighing evidence, need the assistance of the trained mind of the judge to the extent of having his opinion on the facts in order to enable them to intelligently and properly discharge their important duty of deciding questions of fact. We will not attempt to restate the arguments which have been made on the two sides of the question. In a critical article contributed to the *American Law Review* in the fall of 1889 (Vol. 23, p. 781) by Henry B. Brown, then district judge and afterwards a justice of the United States Supreme Court, referring to certain statutes regulating jury trials, which he said had "become fashionable," which prohibit the judge from charging or commenting on matters of fact, and require all charges to be in writing, and provide for the giving of only such instructions as have been requested, either with or without modification, and require the submission of special questions to the jury, the learned author said, "Perhaps the first of these laws, prohibiting the judge from charging with respect to matters of fact is the least objectionable, both upon the score of constitutionality and expediency." And he conceded "a great difference of opinion, even among the leading men of the profession, with regard to the propriety of a judge expressing his views of the testimony to the jury."

The question, then, is whether this statutory provision as heretofore construed and now understood is in conflict with the

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Seventh Amendment of the Constitution which declares that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." There seems to be no reported case in which the constitutionality of a similar statute has been passed upon. After the exceptions in this case were argued counsel were requested to further brief the constitutional question, and at the request of the court, the question being one of general importance, briefs have been submitted by the attorney general and the city and county attorney of Honolulu. The diligence of counsel has failed to bring to light a single case in which the question was discussed. This fact is of great significance. It is said that the rule prohibiting trial judges from commenting on the facts and expressing an opinion on the weight of the evidence prevails in a majority of the States. 38 Cyc. 1646. In a few of the States, five we believe, the subject is covered by constitutional provision. And in a few we believe the practice is followed without any constitutional or statutory requirement. In several of the States in which the constitutions contain provisions preserving the right of trial by jury similar to the provision of the Seventh Amendment statutes more or less like ours have been in force for a great many years. In North Carolina, for example, since 1796, *State v. Lipsey*, 14 N. C. 485; in Texas since 1853, *T. & P. R. Co. v. Murphy*, 46 Tex. 356; in Massachusetts since 1860, *Com. v. Barry*, supra; and in Maine since 1874, *State v. Day*, supra. In *Hopt. v. Utah*, 104 U. S. 631, and 114 U. S. 488, judgment of conviction upon a charge of murder was twice reversed because the trial judge had charged the jury orally in violation of a provision of the code of the Territory of Utah which required that the charge should be reduced to writing before being delivered. And in the same case in 110 U. S. 574, the judgment was reversed for violation of the provision of the code of the Territory that the judge "may state the testimony and declare the law," but "must not charge the jury in respect of matters of fact," the court

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saying, "The prisoner had the right to the judgment of the jury upon the facts uninfluenced by any direction from the court as to the weight of evidence." It is true the question of the constitutionality of the statute was not raised in that case, and we regard that fact as significant. And while the Supreme Court would not be likely to question the constitutionality of an act of Congress when the question had not been agitated by counsel, we doubt whether it would have refrained from suggesting the point as to the legislation of the Territory had it entertained the opinion that it was invalid. About twenty-three years have elapsed since the publication of Mr. Justice Brown's article, and thirteen years have passed since the decision of the case of *Capital Traction Co. v. Hof*, 174 U. S. 1, the case principally relied on by the appellee, yet during this time no attempt has been made so far as we have been able to ascertain to get rid of the statute in any jurisdiction where it has been enacted either by repealing it or having it declared unconstitutional. This would seem to indicate an opinion on the part of the profession generally that the statute is not obnoxious to the constitutional requirement.

It must be regarded as settled that the Seventh Amendment applies to the Territories. *Thompson v. Utah*, 170 U. S. 343; *Black v. Jackson*, 177 U. S. 349; *Rasmussen v. United States*, 197 U. S. 516. And that "the right of trial by jury" which the Amendment preserves is that right as it existed at common law. But was the practice of charging the jury upon the facts a fundamental element of the right itself or merely an incident of that right growing out of the habit of the English judges in summing up the case to comment on the evidence and give their views thereon to the jury? The Federal Constitution is regarded as an enumeration of general principles, designed to endure for all time, to be read in the light of the common law, and to be applied and adapted to new conditions as they may arise. In this view the Seventh Amendment should not be, and, we believe, has not been, regarded as having been designed to

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perpetuate trial by jury as it was practiced in England at the time of the adoption of the Constitution in all its details. It was the right, not necessarily all the incidents of that right, that was intended to be secured. The right itself was and is preserved, but its incidents are subject to legislative control, and the practice in applying and the mode of enforcing the right may be altered to meet changed conditions. Legislation which merely regulates the exercise of the constitutional right and does not rob it of any of its essential ingredients does not constitute an infringement of the right. The constitutional guaranty of this right did not necessarily extend to an accidental element as distinguished from an inherent part of the institution. *Dowling v. State*, 5 S. & M. (Miss.) 664, 682, 685; *Warren v. Com.* 37 Pa. St. 45, 52, 53. *Com. v. Dorsey*, 103 Mass. 412, 418, 419; *Foster v. Morse*, 132 Mass. 354; *Stokes v. People*, 53 N. Y. 164, 173. In *Peirson v. Boston El. Ry. Co.*, 191 Mass. 223, 230, the court quoted the case of *Capital Traction Co. v. Hof*, to the effect that "a trial by jury of twelve men in the presence and under the charge and supervision of the judge empowered to instruct them on the law," and "to set aside the verdict if in his opinion it is against the law or the evidence," and held that a statute providing that a verdict should not be set aside except upon motion stating the reasons relied upon in its support did not conflict with the clause of the constitution of Massachusetts which secured the right of trial by jury. In *State v. Withrow*, 133 Mo. 500, 519, the court said that the constitutional declaration that "the right of trial by jury, as heretofore enjoyed shall remain inviolate," means "that all the substantial incidents and consequences which pertained to the right of trial by jury are beyond the reach of hostile legislation, and are preserved in their ancient substantial extent as existing at common law."

If, therefore, we are dealing with a mere insubstantial incident and not with a constituent part of the fundamental right, the Constitution has not been violated if the legislation has left

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the right practically intact. And we believe the right is left intact by the statute and practice of this Territory.

It has long been settled that in the courts of the United States the trial judges may, if they deem it advisable, comment upon the evidence and express their opinions relative thereto to the jury, provided the comment is not unfair and the decision of the facts is left absolutely to the jury. *Carver v. Astor*, 4 Pet. 1; *Kelly v. Jackson*, 6 Pet. 622; *Nudd v. Burrows*, 91 U. S. 426; *Railroad v. Putnam*, 118 U. S. 545; *United States v. Railroad*, 123 U. S. 113; *Starr v. United States*, 153 U. S. 614. Also that state statutory and constitutional provisions regulating the practice in jury trials do not affect the Federal practice. *Nudd v. Burrows*, supra; *St. Louis R. Co. v. Vickers*, 122 U. S. 360; *Indianapolis R. Co. v. Horst*, 93 U. S. 291. But it does not necessarily follow that the practice heretofore observed in the Federal courts cannot be changed by Congress, or that the Seventh Amendment requires that the practice shall be followed in the courts of the Territories.

Blackstone described the charging of the jury as follows: "When the evidence is gone through on both sides, the judge, in the presence of the parties, the counsel and all others, sums up the whole to the jury; omitting all superfluous circumstances, observing wherein the main question and principal issue lies, stating what evidence has been given to support it, with such remarks as he thinks necessary for their direction, and giving them his opinion in matters of law arising upon that evidence." 3 Bl. Com. 375. Judge Cooley said, "Many of the incidents of a common law trial by jury are essential elements of the right. The jury must be indifferent between the prisoner and the Commonwealth; and to secure impartiality challenges are allowed, not only for cause, but also peremptory without assigning cause. The jury must also be summoned from the vicinage where the crime is supposed to have been committed. * * * The jury must unanimously concur in the verdict. * * * And the jurors must be left free to act in ac-

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cordance with the dictates of their judgment. The final decision of the facts is to rest with them, and interference by the court with a view to coerce them into a verdict against their convictions is unwarrantable and irregular." Cooley, Con. Lim. (7th Ed.) 459, 460. Neither of those eminent authorities refer to the giving to the jury the judge's opinion on the facts as an element of the right of trial by jury. It has been referred to as "practice" in a way as to differentiate it from a matter of fundamental right. See 1 Blashfield, Instructions to Juries, Sec. 53. In *Railroad v. Putnam*, supra, it was said, "In the courts of the United States, as in those of England, from which our practice was derived, the judge, in submitting a case to the jury, may, at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts." 118 U. S. 553. "The English practice and also the Federal practice permit this to be done, but not ours." *Withers v. Lane*, 144 N. C. 184, 190. In *Capital Traction Co. v. Hof*, supra, Mr. Justice Gray, speaking for the court, defined the common law right of trial by jury as follows: "'Trial by jury' in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and empaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to *instruct them on the law* and to *advise them on the facts*, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence." 174 U. S. 13, 14. The case of *Lamb v. Lane*, 4 Oh. St. 167, 179, was there quoted from wherein this language was used, "the word 'jury' in section 19 of article 1, as well as in other places

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in the constitution where it occurs, means a tribunal of twelve men, presided over by a court, and hearing the allegations, evidence and arguments of the parties." *The Opinion of Justices*, 41 N. H. 550, was also quoted from wherein this language was used, "A jury for the trial of a cause was a body of twelve men, * * * who, after hearing the parties and their evidence, and receiving the instructions of the court relative to the law involved in the trial, and deliberating, when necessary, apart from all extraneous influences, must return their unanimous verdict upon the issue submitted to them." There is also a quotation from *United States v. Bags of Merchandise*, 2 Sprague 85, 88, including this: "Now the trial by jury was, when the Constitution was adopted, and for generations before that time had been, here and in England, a trial of an issue of fact by twelve men, under the direction and superintendence of the court. This direction and superintendence was an essential part of the trial." None of those quotations contain any statement in regard to the court's expressing its opinion on the facts to the jury. The quotation from Hale's *History of the Common Law*, that the judge is able "in matters of fact, to give them great light and assistance, by his weighing the evidence before them, and observing where the question and knot of the business lies; and by showing them his opinion even in matter of fact, which is a great advantage and light to laymen," seems to us to be a description of the English practice rather than an enumeration of the fundamentals of the right of trial by jury. Justice Gray's language that at common law the trial judge was empowered to "advise" the jury on the facts does not necessarily mean that the practice of giving them his opinion on the facts was an inherent part of the right of trial by jury. Full effect may be given to the language of the court in the case of *Capital Traction Co. v. Hof* by a holding that the power referred to, to advise on the facts, is the power to state or sum up the evidence. This is in accord with the procedure described by

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Blackstone, and it does not include the expressing of an opinion on the weight of the evidence or the credibility of the witnesses which only is prohibited by our statute. We are of the opinion, therefore, that section 1798 of the Revised Laws is not in conflict with the Seventh Amendment of the Constitution.

Defendant's exceptions Nos. 8, 9 and 10 are sustained; the judgment is vacated; and a new trial granted.

J. Lightfoot for plaintiff.

W. B. Lymer (*Thompson, Wilder, Watson & Lymer* on the brief) for defendant.

DISSENTING OPINION OF PERRY, J.

This is an action of assumpsit for principal and interest on a promissory note for \$1000 executed by the defendant in favor of the plaintiff. The defendant in her answer admits the execution and delivery of the note and pleads its payment in full save as to the sum of \$62 principal and \$63.47 interest and adds a counter-claim for \$1068.95 for moneys advanced, presenting a net claim in favor of the defendant of \$943.48. Trial was had before a jury on the issue of the payments and advances. The verdict was for the plaintiff in the sum of \$1365.68.

One of the exceptions is to the court's refusal to give defendant's requested instruction that "in this as in all civil cases, it devolves upon the plaintiff to prove by a fair preponderance of the evidence the allegations of her complaint and in judging what constitutes a fair preponderance of the evidence you should take in consideration all of the testimony, that adduced by the plaintiff and by the defendant, and the interest of any witness or witnesses regarding the matter testified to, their bias or prejudice if any, and the probability or improbability of their story." Upon the point involved the instruction of the court was in effect that the plaintiff's duty to prove her case by a preponderance of the evidence was

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sufficiently performed by the defendant's admission of the execution and delivery of the note and that "the affirmative defense of the defendant, that is to say, the counter-claim, would in my opinion have to be proved by a preponderance of the evidence. In other words, the burden of proof would be upon the defendant to show the affirmative defense, in other words, the amount of the payments alleged to have been made." The instruction as given was correct. Payment and counter-claim are affirmative defenses and the burden is upon the party pleading them to prove them by a preponderance of the evidence. 22 Ency. 587; 30 Cyc. 1264; *Simonton v. Winter*, 5 Pet. 141; *Grant v. Roberts*, 38 S. W. (Tex.) 650; *Meyer v. Hafemeister*, 119 Wis. 539; *Smith v. Woodworth*, 43 Vt. 39; *Ford v. Lawrence*, 51 S. W. (Tenn.) 1023; *Railroad v. Adams*, 54 Pa. St. 94; *Harmon v. Taylor*, 98 N. C. 341; *Wessel v. Bishop*, 107 N. W. (Neb.) 220; *Ferguson v. Dalton*, 158 Mo. 323; *National Bank v. Hellyer*, 53 Kans. 695; *Walker v. Russell*, 73 Ia. 340; *Liesemer v. Burg*, 106 Mich. 124; *Willis v. Holmes*, 28 Or. 265.

The defendant's main reliance is upon the exceptions presenting the question of whether the presiding judge in his charge to the jury commented upon the weight of the evidence contrary to the provisions of R. L., section 1798. That section provides that "the jury shall in all cases be the exclusive judges of the facts in suits tried before them, and the judge presiding at any jury trial * * * shall in no case comment upon the character, quality, strength, weakness or credibility of any evidence submitted, or upon the character, attitude, appearance, motive or reliability of any witness sworn in a cause; provided, however, that nothing herein shall be construed to prohibit the court from charging whether there is or is not evidence (indicating the evidence), tending to establish or to rebut any specific fact involved in the cause."

The plaintiff's case in the main was that in May, 1903, she sold to the defendant all her interest in certain real estate for

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the agreed sum of \$5000; that the defendant paid \$2500 cash on account, assumed payment of a mortgage upon other property of the plaintiff in favor of one Wiggins for the sum of \$600 and gave two promissory notes, one for \$900, admittedly outlawed by the statute of limitations at the time of the institution of the present suit, and the note which is the subject of this action. The defendant's contention, on the other hand, was, admitting the sale and purchase, that the agreed price was \$2500 and that payment was made by the assumption of the Wiggins' mortgage for \$600 and the giving of the two notes, one for \$900 and one for \$1000; that subsequent to this transaction various sums were paid from time to time by the defendant to the plaintiff, at first in payment of the \$1000 note and subsequently by way of loans to the plaintiff, the latter class of items being the subject of the counter-claim pleaded in the answer. In reply the plaintiff's claim was that such payments as were made by the defendant to the plaintiff, aside from the first item of \$2500, were applied to the \$900 note, that the \$1000 note remained unpaid and that no advances purely as such were made.

After giving a brief outline of the case the court instructed the jury as follows:

"While you are the sole judges of the facts as presented to you by the testimony of the witnesses, it is within the province of the court to tell you what evidence there is tending to prove certain facts. Taken from the plaintiff's standpoint there is evidence tending to prove that the consideration paid by Mrs. Lucas, or agreed to be paid by Mrs. Lucas to her, was five thousand dollars. There is evidence tending to prove that that payment was made by the giving of twenty-five hundred dollars in cash, a note for one thousand dollars, which is not the subject of this suit and is not to be considered by you so far as judgment is concerned and only so far as the question of application of payments, with another balance of six hundred dollars, said to have been for the purpose of applying upon the Wiggins mortgage. It becomes important for you in the first instance, it appears to me, under the issue framed in this case, to determine first of all what was the purchase

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price agreed to be paid by Mrs. Lucas to Mrs. Bannister, and around that principal fact revolve the other incidents that you must consider in order to arrive at your verdict.

"The consideration named in a deed is not conclusive; it only remains in the deed as prima facie evidence of the consideration until disproved. There is testimony tending to prove that the consideration named in the deed from Mrs. Bannister to Mrs. Lucas was not the correct consideration, and you may take into consideration the testimony that has been given upon that point in arriving at your conclusion.

"The payments admitted by the plaintiff I have made a memorandum of, and, while my memorandum is not binding in any way upon you as to what your finding should be, my view of the case is that there is evidence tending to prove that there have been items paid by Mrs. Lucas, through her husband Mr. Charles Lucas, of \$2500 at the outset of the transaction between these parties and other items amounting to \$1350.45, which, according to my figures, would make a total payment admitted by the plaintiff of \$3850.45, which, subtracted from the \$5000 alleged to have been the consideration money, would leave the sum of one thousand one hundred and forty-nine dollars and fifty-five cents due at the date on which the note became due. I wish to reiterate, gentlemen, that this is not a finding for you to follow; that is simply my idea of what the evidence tends to prove; you may set that aside entirely in your finding, for I have no right to comment upon the testimony nor to make any finding of facts but I simply have the right to say what in my opinion the testimony tends to prove.

"So much for the plaintiff's side of the case as I view it. The testimony of the defendant tends to prove that the original consideration agreed upon between the plaintiff and the defendant was \$2500, the items of which have been testified to by the defendant as having been paid on the original note and on the counter-claim, amount to \$1896.47. The \$100 item, being the first item, Exhibit 'A', has been abandoned. The first item in the counter-claim of \$10 has likewise been abandoned. There are several other items upon which it seems to me the evidence does not warrant my fixing any suggestion as to it tending to prove or disprove any fact; those matters are still entirely in your hands and you may take them

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up as being conclusively or satisfactorily proved or not as you believe the testimony, so that if you disbelieve or are not satisfied with the testimony of the plaintiff, as I see it, there is evidence tending to prove that the defendant is entitled to a judgment for \$894.47."

Whatever might be said of the remainder of the instructions just quoted, if they had stood alone, those portions relating to the court's memorandum and payments admitted to have been received by the plaintiff and to the "other items" which did "not warrant * * * fixing any suggestion" as to their tending to prove or disprove any fact, were clearly within the prohibition of section 1798. An examination of the transcript of the evidence adduced at the trial shows that there was evidence from which the jury could have found a total of \$1375 (or, if the plaintiff referred to one item only of \$15 instead of two such items, then a total of \$1360), and not \$1350.45, admitted to have been received by the plaintiff from the defendant in addition to the main payment of \$2500 referred to in the instructions. In addition there was evidence of items of \$10, \$48 and \$5, respectively, testified to on behalf of the defendant as having been paid by her to the plaintiff and concerning which the plaintiff in her testimony simply said that she did not remember whether those payments had been made to her. The presiding judge's remarks on the subject could reasonably have led the jury to believe that the evidence relating to any payments, aside from the item of \$2500 and the total of \$1350.45, was deemed by him unworthy of credence or at least of not as much weight as the evidence specifically referred to by him. The statement concerning the other items not warranting the judge in "fixing any suggestion" concerning them could reasonably have strengthened and emphasized this understanding on the part of the jury as well as reasonably have led them to believe that in his remarks the judge had referred, both on the subject of the plaintiff's evidence and on the subject of the defendant's

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evidence, to all of the items and phases of the case regarded by him as worthy of serious consideration by the jury. Nor was the error in making these comments cured by the statements to the jury that he, the judge, had "no right to comment upon the testimony nor to make any findings of fact" and that the jury were the exclusive judges of the facts and of the credibility of the witnesses. The information had, nevertheless, been conveyed to the jury as to the weight accorded by the judge to the evidence referred to in the comments in question as against other evidence not specifically mentioned by him.

The instructions violate the provisions of the statute and it becomes necessary, therefore, to consider the further contention advanced by the plaintiff that the statute is unconstitutional and void on the ground that it is contrary to the provisions of the Seventh Amendment to the Constitution,—unless it is true that, as suggested by the defendant, even though the statute is unconstitutional, the charge as given was objectionable under the rules of the common law.

Assuming, for the moment, that the statute is unconstitutional and that under the constitutional guarantee the parties are entitled to a trial at which the judge shall have the power of commenting on the weight of the evidence, but also that, as suggested by defendant, the comments, if any, must be fair, the charge given in the case at bar cannot be held objectionable. While the language used disclosed the opinion of the trial judge concerning the relative merits of the claims, or some of them, of the parties upon the issues of fact, it was not unfair. The judge did indeed give to the jury a memorandum of the payments admitted by the plaintiff to have been made by the defendant and as pointed out above that memorandum was in some respects incomplete. The jury were, however, carefully instructed that "my memorandum is not binding in any way upon you as to what your finding should be. * * * I wish to reiterate, gentlemen, that this is

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not a finding for you to follow but that it is simply my idea of what the evidence tends to prove; you may set that aside entirely in your finding for I have no right to comment upon the testimony or to make any finding of facts but I simply have the right to say what in my opinion the testimony tends to prove." And again: "There are several items upon which it seems to me the evidence does not warrant my fixing any suggestion as to it tending to prove or disprove any fact; those matters are still entirely in your hands and you may take them up as being conclusively or satisfactorily proved or not as you believe the testimony. *** If you believe from the testimony that certain advances were made by the defendant to the plaintiff then these advances are to be credited to the defendant and against the plaintiff as you consider those amounts to have been proved by a preponderance of the evidence." The fact that items had been testified to other than those contained in the judge's memorandum of payments or otherwise referred to in the charge was sufficiently called to the attention of the jury by the judge and so also they were clearly instructed that it was within their province and a part of their duty to consider all of the matters testified to whether specifically referred to in the memorandum or charge or not.

Is the statute constitutional? Upon this point I am unable to concur in the views of the majority. A consideration of the following questions is involved: (1) Does article 7 of the amendments to the Constitution apply to the Territory of Hawaii? (2) What did the "trial by jury" consist of, the right to which was preserved by that amendment? (3) At such a "trial by jury" did the presiding judge have the power to comment on the weight of the evidence and to express his opinion on the facts? (4) If he did, was the power one of the essentials of the trial?

Article 7 of the amendments to the Constitution provides that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be

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preserved." There is no room for doubt at this day that this amendment applies to the Territory of Hawaii. The Organic Act specifically declares in section 5 that "the Constitution, and, except as otherwise provided, all the laws of the United States * * * which are not locally inapplicable, shall have the same force and effect within the said Territory" of Hawaii "as elsewhere in the United States." This language is unambiguous and of itself sufficient to show that the Seventh Amendment is in force here. In a number of cases decided since June, 1900, when the Organic Act went into effect, this court has recognized that other articles of the amendments, including the fifth and the sixth, the first relating to indictments for infamous crimes and to the requirement of due process of law and the second securing to the accused in all criminal prosecutions the right to a trial by an impartial jury, are in full force in Hawaii. See, for example, *Robertson v. Pratt*, 13 Haw. 590, in which the court said, "the Fifth Amendment, however, which provides that 'no person shall be * * * deprived of life, liberty or property without due process of law,' undoubtedly applies to the Territories"; and *Pringle v. Hilo Mercantile Co.*, Id. 705; *In re Wong Lung*, 17 Haw. 168; *Ex parte Higashi*, Id. 428; *In re Ewa Plantation Co.*, 18 Haw. 530; *Territory v. Pottie*, 19 Haw. 99; *Territory v. Martin*, Id. 201; *Trust Co. v. Treasurer*, Id. 262; *In re Atcherley*, Id. 346 and 535; *Territory v. Toyota*, Id. 651; *Territory v. Soga*, 20 Haw. 71, and *Bicknell v. Herbert*, Id. 132. In *Territory v. Schilling*, 17 Haw. 249, 264, 265, the court said, with reference to the very statute now under consideration, "if the statute requires, as we do not think that it does, a reversal of judgment for any comments whatsoever made by the court upon the evidence, then it would be requisite to consider whether the statute is constitutional in limiting the right to a common law trial by jury"; but found it unnecessary to pass upon the question of constitutionality since it construed the statute as not requiring a reversal for comments

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such as those which had been made by the trial judge in that case.

The Supreme Court of the United States likewise has expressed itself clearly upon the subject. "In *Reynolds v. United States*, 98 U. S. 145, 154, it was taken for granted that the Sixth Amendment of the Constitution secured to the people of the Territories the right of trial by jury in criminal prosecutions; and it had been previously held in *Webster v. Reid*, 11 How. 437, 460, that the Seventh Amendment secured to them a like right in civil actions at common law." *Callan v. Wilson*, 127 U. S. 540, 550. "The Seventh Article of Amendment of the Constitution declares that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.' This Article of the Constitution is in full force in Montana as in all other organized Territories of the United States." *Kenmon v. Gilmer*, 131 U. S. 22, 28. "That the provisions of the Constitution of the United States relating to the right of trial by jury in suits at common law apply to the Territories of the United States is no longer an open question." *Thompson v. Utah*, 170 U. S. 343, 346. See also *American Publishing Co. v. Fisher*, 166 U. S. 464; *Salt Lake City v. Tucker*, Id. 707; *Capital Traction Co. v. Hof*, 174 U. S. 1, 5.

It is equally clear that the right secured by the Seventh Amendment is to a trial by jury as it existed at the common law at the time of the adoption of the Constitution and that a judge empowered to advise on the facts as well as to direct on the law was as indispensable a part of that trial as was the jury authorized to determine the facts. "Trial by jury," in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority

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to cause them to be summoned and empaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence. This proposition has been so generally admitted, and so seldom contested, that there has been little occasion for its distinct assertion. Yet there are unequivocal statements of it to be found in the books. Lord Hale, in his History of the Common Law, c. 12, 'touching trial by jury,' says: 'Another excellency of this trial is this, that the judge is always present at the time of the evidence given in it. Herein he is able in matters of law, emerging upon the evidence, to direct them; and also, in matters of fact, to give them great light and assistance, by his weighing the evidence before them, and observing where the question and knot of the business lies; and by showing them his opinion even in matter of fact, which is a great advantage and light to laymen. And thus, as the jury assists the judge in determining the matter of fact, so the judge assists the jury in determining points of law, and also very much in investigating and enlightening the matter of fact, whereof the jury are the judges.' And again, in summing up the advantages of trial by jury, he says: 'It has the advantage of the judge's observation, attention and assistance, in point of law by way of decision, and in point of fact by way of direction to the jury.' 2 Hale Hist. Com. Law, (5th ed.) 147, 156. See also 1 Hale P. C. 33.' 'The Constitution secures a trial by jury, without defining what that trial is. We are left to the common law to learn what it is that is secured. Now the trial by jury was, when the Constitution was adopted, and for generations before that time had been, here and in England, a trial of an issue of fact by twelve men, under the direction and superintendence of

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the court. *This direction and superintendence was an essential part of the trial.* 'At the time of the adoption of the Constitution, it was a part of the system of trial by jury in civil cases that the court might, in its discretion set aside a verdict.' 'Each party, the losing as well as the winning, has a right to the legitimate trial by jury, with all its safeguards, as understood when the Constitution was adopted.' *United States v. Bags of Merchandise*, (1863) 2 Sprague, 85-88. This court has expressed *the same idea*, saying: 'In the courts of the United States, as in those of England, from which our practice was derived, the judge, in submitting a case to the jury, may, at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts.' *Vicksburg &c. Railroad v. Putnam*, (1886) 118 U. S. 545, 553." *Capital Trac-tion Co. v. Hof*, supra. The language of the court and of the authorities quoted by it in support and elaboration of its definition of "trial by jury" renders it clear to my mind that the power mentioned "to advise on the facts" includes the power to communicate to the jury the judge's view concerning the weight of the evidence and his opinion as to the facts,—subject always to the qualification that the determination of the issues of fact must be distinctly left to the jury—and is an essential part of the trial. "Trial by jury in the courts of the United States is a trial presided over by a judge, with authority, not only to rule upon objections to evidence, and to instruct the jury upon the law, but also, when in his judgment the due administration of justice requires it, to aid the jury by explaining and commenting upon the testimony, and even giving them his opinion upon questions of fact, provided only he submits those questions to their determination." *United States v. Railroad*, 123 U. S. 113, 114. "In what does the right of trial by jury consist? The Constitution furnishes no answer. It is spoken of as something already suf-

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ficiently understood, and referred to a matter already familiar to the public mind. It was unnecessary to define this right. It then stood as a representative of an idea as certain and definite as any other in the whole range of legal learning. It is the right recognized in the *Magna Charter* and is the same that was brought to this Continent by the first settlers from England." *Barlow v. Daniels*, 25 W. Va. 512, 517. See also *Railroad v. Putnam*, supra; *Lovejoy v. United States*, 128 U. S. 171, 173; *Simmons v. United States*, 142 U. S. 148, 155; *West v. Gammon*, 98 Fed. 426, 427; Cooley's Constitutional Limitations (6th ed.), 389.

In *Nudd v. Burrows*, 91 U. S. 426, 439, the following was said: "Care must be taken that the jury is not misled into the belief that they are alike bound by the views expressed upon the evidence and the instructions given as to the law. They must distinctly understand that what is said as to the facts is only advisory and in no wise intended to fetter the exercise finally of their independent judgment. Within these limitations it is the right and duty of the court to aid them by recalling the testimony to their recollection, by collating its details, by suggesting grounds of preference where there is contradiction, by directing their attention to the most important facts, by eliminating the true points of inquiry, by resolving the evidence, however complicated, into its simplest elements, and by showing the bearing of its several parts and whether of a binding effect, stripped of every consideration which might otherwise mislead or confuse them. How this duty shall be performed depends in every case upon the discretion of the judge. There is none more important resting upon those who preside at jury trials. Constituted as juries are it is frequently impossible for them to discharge their function wisely and well without this aid. In such cases chance, mistake or caprice may determine the result."

"In the courts of the United States, as in those of England from which our practice was derived, the judge in submitting

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a case to the jury may at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts; but the expression of such an opinion, when no rule of law is incorrectly stated and all matters of fact are ultimately submitted to the determination of the jury cannot be reviewed on writ of error." *Railroad v. Putnam*, supra. With the charge of the court to the jury upon mere matters of fact and with its commentaries upon the weight of evidence this court has nothing to do. Observations of that nature are understood to be addressed to the jury merely for their consideration as the ultimate judges of matters of fact; and are entitled to no more weight or importance than a jury in the exercise of their own judgment choose to give them." *Carver v. Astor*, 4 Pet. 1, 79, 80. See also *Lovejoy v. United States*, supra; *Simmons v. United States*, supra; *Ganes v. Dunn*, 14 Pet. 322, 326; *Magniac v. Thomson*, 7 Pet. 348, 389; *Mitchell v. Harmony*, 13 How. 115, 131; *Railroad v. Vickers*, 122 U. S. 361, 363; *United States v. Railroad*, 123 U. S. 113, 114; and *Kerr v. Modern Woodmen of America*, 117 Fed. 593, 596.

The fact that the statute under consideration has been in force in Hawaii since 1892 cannot avail in this instance as against the decisions of the Supreme Court of the United States. It is established by these decisions that it is the common law of England at the date of the adoption of the Constitution, and, necessarily, not the common law or the statutes of Hawaii, that is to be resorted to in order to ascertain the essentials of the "trial by jury" whose continuance was preserved by the Constitution. Argument would seem to be unnecessary to support the conclusion that the framers of that instrument could not have had in mind the laws or the practice of Hawaii. And when Hawaii became a part of the United States it accepted the guaranties of the Seventh Amend-

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ment with such changes in practice, if any, as might be thereby involved.

From States having constitutional provisions to the same effect as that of the Seventh Amendment cases are cited in which it has been held that the presiding judge has not the power to comment upon the weight of the evidence or to express an opinion on the facts. In a few of those cases the decisions were influenced, in part at least, by statutes, like ours, expressly prohibiting such comments. In the others the rulings would seem to have been made in the absence of any such statute. In none of them was the question of the validity of such statutes or practice considered or raised. There is, indeed, room for the argument, from the failure of those courts to declare such statutes unconstitutional, that the power of the judge to comment on the evidence was not by those courts deemed an essential part of trial by jury, but on the other hand the consideration is at least equally forcible that courts do not decide or consider issues of unconstitutionality unnecessarily. In any event this negative showing from state courts should not prevail against the expressed views of the Supreme Court of the United States in the *Hof* case.

Referring to some of the other cases cited: In *Hopt v. Utah*, 110 U. S. 574, a conviction of murder in the first degree was set aside on the ground that the trial judge commented on the weight of the evidence in violation of the provisions of a statute of the Territory of Utah that the judge "must not charge the jury in respect of matters of fact"; but the question of the constitutionality of the statute was not raised or considered. In *Hicks v. United States*, 150 U. S. 442, also a case of murder, comments adverse to the credibility of the defendant resulted in the award of a new trial. The ruling, however, was in substance that the comments or instructions included an erroneous exposition of the law applicable to the point under consideration and were themselves unfair. It is evident that none of the earlier decisions of the Supreme

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Court were regarded by the court as in conflict with the law laid down in the *Hof* case. On the contrary the observation was made that "the proposition has been so generally admitted and so seldom contested that there has been little occasion for its distinct assertion."

The case of *Peirson v. Boston Elevated Railway*, 191 Mass. 223, is not an authority in support of the appellant. It was there held that a statute providing that "a verdict shall not be set aside except upon a motion in writing by a party to the cause, stating the reasons relied upon in its support, filed and heard after notice to the adverse party according to the rules of court" was not in conflict with the provision of the constitution of Massachusetts which secured the right of trial by jury. The conclusion reached was based upon the view that it is competent for a losing party to waive any one or all of the possible grounds for a new trial. This was not the equivalent of holding that a statute forbidding trial judges to grant a new trial in any case would not violate the constitutional provision. In effect the decision was that the constitutional guarantee of a trial presided over by a judge empowered to set aside the verdict if in his opinion it is against the law or the evidence was not infringed upon by a statute permitting unsuccessful litigants to waive the benefit of a new trial or of any of the possible grounds for securing one and requiring presiding judges not to force new trials upon parties not desiring them,—a view in keeping with the familiar principle that courts do not act in awarding judgments or in otherwise granting relief except upon application of the parties. The distinction here sought to be presented was recognized by the court. It said, *inter alia*: "The statute now in question does not absolutely deprive the parties of the right to have a new trial, if it seems to the presiding judge that one ought to be ordered. If that were the case, a very different question would be raised from the one which is now before us. It simply provides * * * that they shall be deemed to waive their right to

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ask for one unless they shall have seasonably exercised it in the manner required by the statute and the rule of court made in pursuance thereof, and that the court shall not in such an event force upon them a new trial which has not been asked for and presumably is not desired by either of them."

While in the *Hof* case it was not expressly held that statutes like ours are unconstitutional in the Territories, the views expressed concerning the definition of the words "trial by jury" in the Seventh Amendment and the essential requirements of a trial by jury at the common law of England irresistibly lead to the conclusion, as it seems to me, that a statute which deprives the judge of one of those essential powers violates the amendment. The position that our statute in effect permits the presiding judge to "advise the jury on the facts", within the meaning of that expression as used by the court in the *Hof* case, seems to me to be untenable. All that it does permit is that the judge charge the jury whether there is or is not evidence (indicating the evidence) tending to establish or rebut any specific fact involved in the cause. That is not a grant of authority to give to the jury advice upon the facts. A judge who fully exercises the powers conceded to him by the statute and yet conscientiously heeds its injunctions will inform the jury what evidence there is which tends to support or to rebut the various claims of fact advanced by the parties and even may, let it be assumed, give a fair summary of all the evidence adduced by each party, but will at the same time so frame his charge on these matters as to be certain not to disclose to the jury his opinion concerning the weight of any of the evidence or the credibility of any of the witnesses. The statute, in prescribing that "the judge presiding at any jury trial * * * shall in no case comment upon the character, quality, strength, weakness or credibility of any evidence submitted, or upon the character, attitude, appearance, motive or reliability of any witness sworn in a cause," attempts to restrain the judge from doing that which at common law he was

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authorized to do. Fettered by these prohibitions he cannot "in matters of fact * * * give them" (the jurors) "light and assistance, by his verifying the evidence before them and observing where the question and knot of the business lies" or "by showing them his opinion even in matter of fact, which is a great advantage and light to laymen," or assist them "in investigating and enlightening the matter of fact, whereof the jury are the judges." To the extent stated the statute is inconsistent with the Seventh Amendment and is therefore invalid. The Organic Act continued in force only those laws of Hawaii "not inconsistent with the Constitution or laws of the United States or the provisions" of that act and granted to the Territory legislative power extending "to all rightful subjects of legislation not inconsistent with the Constitution and Laws of the United States locally applicable." Sections 6 and 55.

It is true, as contended by counsel for the defendant, that section 1798 has often been enforced by this court as well as by trial judges but the question of its constitutionality has not been raised in any previous case in this court. The presumption always is that an act passed by the legislature is constitutional and valid and courts do not consider questions of possible unconstitutionality unless compelled to do so by the state of the record. Cooley's Constitutional Limitations (6th ed.), p. 216 et seq. In the case at bar determination of the question becomes for the first time unavoidable.

In my opinion the trial judge in making the comments objected to did not exceed the powers possessed by a presiding judge in a common law trial by jury and the exceptions should therefore be overruled.

No. 74. LUCY de COITO v. MANUEL de COITO. Appeal from Circuit Judge, First Circuit. Motion for extension of time for filing necessary papers on appeal. Filed August 16, 1912. Decided August 19, 1912. Robertson, C. J., Perry

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and De Bolt, JJ. Per Curiam: The decree appealed from was entered May 28, 1912, and on the following day the appellant filed a notice of appeal, paid the costs required by law and otherwise perfected the appeal. On June 3 the trial judge made an order directing the stenographer to prepare and file a transcript of the testimony. Owing to preparation of transcripts under earlier orders of the trial judge and to press of other duties in court the stenographer has been unable to prepare the transcript in the case at bar. From time to time since the issuance of the order of June 3 appellant's attorney has called upon the reporter to ascertain whether the manuscript had been prepared and on or about July 15 requested opposing counsel to enter into a stipulation for an extension by this court of the time for the filing of the necessary papers on appeal, a negative reply to the request being received only a day or two prior to the filing of the motion now under consideration. It is clear that all of the requirements of the statute for the perfecting of the appeal were complied with within the time required by law and that appellant has done all in her power to procure at the earliest possible date a transcript of the testimony. That the transcript is necessary for the determination of the issues raised on the appeal is undisputed. Under these circumstances a motion to dismiss the appeal for failure of prosecution could not be granted. The provision of Rule 2 of this court is that an appeal "*may*" in a proper case be dismissed for want of prosecution,—not that it *shall* be dismissed in all cases of failure to file the record within twenty days after the perfecting of the appeal. The better practice would have been to have presented the application for the extension of time before the expiration of the twenty days but the extension may nevertheless be granted subsequent to that period. The motion is granted.

Lorrin Andrews for libellant.

W. T. Rawlins for libellee.

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LAU LAM v. A. A. WHITCOMB, W. R. KILLINGER,
LUM HEE AND LUM CHING, INDIVIDUALLY
AND AS COPARTNERS DOING BUSINESS TO-
GETHER UNDER THE FIRM NAME AND STYLE
OF "HONOLULU BRICK & STONE CO.," AND
W. C. ACHI.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED JULY 24, 1912.

DECIDED AUGUST 21, 1912.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

JUDGMENT—*res judicata*—burden of proof.

The burden of proving a former adjudication is upon the party who sets it up as a defense.

EXECUTORS AND ADMINISTRATORS—"administrators with the will annexed"—inference that property devised.

From the fact that certain administrators were appointed "with the will annexed" the inference would seem to be that the probate court proceeded upon the assumption that the document referred to in the petition as a will did contain a devise of property, otherwise the case would have been one of intestacy and the appointment would have been of administrators without any reference to a will.

EVIDENCE—translation of will in foreign language—meaning of words.

In an action of ejectment in which one of the parties claims as devisee under a will written in a foreign language it is competent for witnesses to testify not only to the possible meanings of particular words when used separately but also to the sense in which, in the witnesses' opinion, those words are used when read in connection with the remainder of the text.

TRIAL—findings of fact—credibility of witnesses.

Issues concerning the credibility of witnesses and the weight of the evidence are to be determined by the trial court and the findings cannot be disturbed if supported by evidence.

OPINION OF THE COURT BY PERRY, J.

This is an action of ejectment relating to a parcel of land situated at Kapalama in Honolulu and described in the declaration by metes and bounds. The plaintiff claims as sole

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devisee under the will of Lau Chong who died in China on May 26, 1900. The defendants, other than W. C. Achi, are tenants of the latter and Achi's claim is, first, that Lau Chong did not by his will devise any property to the plaintiff, and, second, that Achi has had adverse possession of the land in dispute for more than the statutory period. The case was tried without a jury and judgment rendered for the plaintiff.

The defendants admitted at the trial that on September 12, 1890, Lau Chong leased to Achi a parcel of land at Kapalama and that at the time of the lease Lau Chong "was seized in fee simple of the premises described in said lease," but they present the contention that the plaintiff failed to prove the identity of the land described in the lease with that described in the declaration. To meet similar objections of the defendants at the trial the plaintiff twice amended his declaration. The evidence of Kanakanni, a surveyor, sufficiently identified the land named in the lease with that described in the declaration as last amended. It is true that since the date of the lease King street has been widened at the point in question and that the lane running mauka from King street on the easterly side of the land described has been opened since that date. It is also clear that on August 27, 1890, Lau Chong conveyed to Achi a piece of land immediately to the west of that covered by the lease and that subsequent to Lau Chong's deed Achi acquired by purchase another strip of land still further to the west, but there was evidence to support a finding that in the last amended description due allowance was made for all of these facts and that the land as thus described does not include any of that held in fee by Achi under the deed from Lau Chong.

In support of his case the plaintiff introduced evidence tending to show that on May 25, 1900, in China, Lau Chong executed a will written in the Chinese language and that the will was admitted to probate in the supreme court of Hong Kong on August 10, 1900. Against the objection of the de-

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fendants testimony was admitted of translations of the will tending to show that all of the testator's property was devised to the plaintiff who was also named in the instrument as the executor. The defendant introduced testimony of translations to the effect that no devise was made of any of the property of the testator to any one and that the instrument simply purported to name Lau Lam as executor. If evidence on this issue was admissible at all there is no doubt that there was ample evidence to support the finding made by the circuit judge that the testator "devised and bequeathed all the property, real and personal, to Lau Lam." The contention that the evidence was inadmissible is based upon the ground that the supreme court of Hong Kong had adjudged, prior to the action of ejectment, that the property of the testator was by the will simply entrusted to him as executor, and in support of this contention reference is made to a translation of the will included in the certificate forwarded from Hong Kong by the acting deputy registrar of the court. According to that translation the testator recites in the will, which is very brief, that he is "prepared to entrust the nearest relation with full power to administer all matters" and that all of his property is "to be committed to my own nephew, Lau Lam, who is made my adopted son, with full power to act therein as executor of this my will." Assuming that this language is to be construed as meaning that the testator intended simply to appoint Lau Lam as executor and passing by the question of the force to be given to such an adjudication by a foreign court, it does not appear from the certificate mentioned or from any other evidence in the case whether the translation included in the certificate was adopted by the supreme court of Hong Kong in connection with the admission of the will to probate or in any other proceeding. Nor has any showing been made as to what laws or procedure prevail in Hong Kong on the subject of whether an instrument which merely provides for the selection of an executor and does not dispose of property

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may be admitted to probate. If under the laws of Hong Kong an instrument which does not make a testamentary disposition of property is provable in a court of probate it was immaterial in the proceeding for the probate of the will in that jurisdiction whether the will did or did not attempt to dispose of the property of the testator. If, on the other hand, such an instrument may not be admitted to probate, the only inference would be that the court found, as did the trial court in the case at bar, that a devise of the property was made. The burden of proving a former adjudication is upon the party who sets it up as a defense, and as to the supposed adjudication in Hong Kong that burden was not successfully borne by the defendants.

It further appeared in evidence that a circuit judge of the first judicial circuit of the Territory of Hawaii, upon petition, on January 17, 1901, appointed Lau Yin and Lau Tong administrators with the will annexed of the estate of Lau Chong. The records of that proceeding forwarded to this court upon these exceptions do not disclose whether the circuit judge passed upon the question as to what was the correct translation of the will of Lau Chong. If it cannot be held to have determined that issue the proceedings do not, of course, constitute a bar to the consideration of the question in this case. From the fact that the administrators were appointed "with the will annexed" the inference would seem to be that the court proceeded upon the assumption that the will did contain a devise of the property, otherwise the case would have been one of intestacy and the appointment would have been of administrators without any reference to the will. Under the circumstances it cannot be held that the evidence relating to the correct translation of the will was improperly admitted.

The defendants' further contention that witnesses were permitted to construe the will as well as to translate it is not borne out by the record. It was competent for them to testify not only to the possible meanings of particular words

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when used separately, but also to the sense in which, in the witnesses' opinion, those words were used in connection with the remaining language of the document under consideration.

Upon the subject of adverse possession it is undisputed that the lease from Lau Chong to Achi contained an option permitting him to purchase the land for the sum of \$1500 at any time prior to December 31, 1895, and that all of the rent accruing to that date was paid by the lessee. This action was commenced June 13, 1910. The defendants introduced evidence tending to show that on December 16, 1895, Achi tendered to Wong Wa Foy, the attorney-in-fact for Lau Chong, the principal being then absent in China, the sum of \$1500 in gold coin accompanied by a request for the execution of a deed upon compliance with the terms of the option; that Wong Wa Foy refused to accept the tender saying that Lau Chong had instructed him to accept not less than \$2500 for the land; that after 1895 Achi refused to pay rent and claimed, occupied and used the land as his own, erecting a building upon the leased property, placing a fence along three sides of it and planting valuable trees—Achi admitting, however, that he was under obligation to pay the lessor or his representatives the sum of \$1500 named in the option. On the other hand, evidence was introduced by the plaintiff tending to show that no tender of \$1500 or of any other sum was ever made; that upon demand by the administrators for the rent Achi promised to pay the same; that no suit for specific performance of the contract to convey has ever been brought although Lau Chong was in Honolulu in or about the month of May, 1896; that in a certain suit brought in 1905 by Lau Lam to enjoin Achi from destroying a fence erected by Lau Lam along the westerly boundary of the land described in the lease from Lau Chong, Achi filed an answer in which he alleged "that he is and has been for fifteen years in the open and exclusive possession of the premises described in said bill of complaint" (the land now in dispute) "under and by virtue

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of a lease from the said deceased Lau Tseung, otherwise known as Lau Chong, which lease contained a provision for the right of purchase, of which this respondent has at all times been willing and desirous to avail himself, but there have been no persons within the Territory who were authorized to receive the money on said purchase and to execute a deed for the same"; and that in November, 1902, upon the hearing of an action brought by the administrators of the estate of Lau Chong against Achi for the rent of the same premises for the years 1896, 1897, 1898, 1899, 1900, in the circuit court of the first circuit of this Territory the following proceedings took place: "Mr. Achi: There is no question as to the amount sued for and I don't know with who I should settle, I claim that I should settle with the heirs, they own the land and an administrator has only a right to the personal property and that is not personal property, that is the only point. Mr. Peters: I would like for it to appear of record that Mr. Achi confesses the correctness of the amount. The Court: I am satisfied, Mr. Achi, that the administrators of the deceased have an estate in this case. You have admitted in open court that the amount sued for is correct? Mr. Achi: The amount is correct. The Court: The only question is as to the proper person to whom it is to be paid? Mr. Achi: Yes, sir." Assuming that the facts relied upon by the defendants upon this phase of the case constitute adverse possession by Achi, there was nevertheless a direct conflict in the evidence as to the existence of those facts. The statements made by Achi in the action for rent are at least capable of the construction that he intended thereby to admit that he was indebted to the representatives of the lessor for the rent, a position wholly inconsistent with a claim of adverse possession. This evidence in connection with the allegations of the answer in the injunction suit and other evidence in the case was ample to support the finding made by the trial judge that "the defendants have failed to show adverse possession of the said premises for the

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statutory period." The issue was one of fact and the credibility of the witnesses and the weight to be given to the evidence were for the trial judge to determine.

Many of the exceptions were taken to rulings upon the admissibility of evidence offered. We find no reversible error in any of the rulings.

The exceptions are overruled.

E. C. Peters for plaintiff.

C. F. Peterson for defendants.

NETTIE L. SCOTT v. KONA DEVELOPMENT COMPANY, LIMITED, A CORPORATION, HAWAIIAN DEVELOPMENT COMPANY, LIMITED, A CORPORATION, AND WEST HAWAII RAILROAD COMPANY, A CORPORATION, J. B. CASTLE AND F. B. McSTOCKER.

EXCEPTIONS FROM CIRCUIT COURT, THIRD CIRCUIT.

ARGUED JULY 29, 1912.

DECIDED AUGUST 21, 1912.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

SET-OFF AND COUNTER-CLAIM—*judgment*.

D having obtained a judgment against S, husband of the plaintiff in this action, assigned the judgment to K, one of the defendants. The defendants sought to set up this judgment as a partial defense against the plaintiff's claim against them. Held, that the plaintiff's claim, a promissory note delivered to her by the defendants for a valuable consideration moving from her, was her individual property and free from any claim which the defendants may have against her husband.

EXCEPTIONS, BILL OF—*sufficiency*.

The mere statement in a bill of exceptions that the defendants "except to the decision" of the court, is not sufficient to bring to

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this court any question or error for review. One of the essential purposes of an exception is, that the attention of the trial court is thereby specifically called to a particular point of law going to the legal sufficiency of the ruling made, thus affording the court an opportunity to correct the supposed error.

OPINION OF THE COURT BY DE BOLT, J.

This action was brought by the plaintiff against the defendants on a promissory note signed by the corporation defendants and endorsed before delivery by the individual defendants, and was tried by the court, jury waived, the decision being that the plaintiff recover from the defendants the sum of \$2000 with interest at 6% per annum from October 30, 1910, to April 30, 1911, and thereafter interest at 8% per annum.

The defendants bring the case here on exceptions.

The facts as disclosed by the record and essential to a correct understanding of the controversy are substantially as follows: That on June 8, 1908, M. F. Scott, husband of the plaintiff, being the owner of a large area of sugar cane (estimated at about 500 acres), also certain leasehold interests and other property, and his wife, the plaintiff in this action, also being the owner of certain land and leasehold interests, as well as having an interest in certain promissory notes for the sum of \$15,000, they, Scott and his wife, entered into a certain so-called trust agreement with the defendants and W. R. Castle, trustee, whereby it was mutually agreed by and between the parties thereto that in consideration of the sale, transfer and conveyance of all the property and interests above mentioned, by Scott and his wife to the defendants, the defendants would sign and deposit with W. R. Castle (to hold pending the settlement of certain matters pertaining to the property above mentioned), certain promissory notes for the total amount of \$93,000, payable in one, two and three years, and also payable alternately to Scott and his wife, which arrange-

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ment was carried out according to the terms of the trust agreement; that the notes mentioned were similar in form, the one in question when deposited with W. R. Castle reading: "Three years after April 30th, 1908, we jointly and severally promise to pay to the order of Nettie L. Scott the sum of two thousand dollars, value received, with interest at 6% per annum, from April 30th, 1908, payable semi-annually, and in default of payment of any interest within thirty days after the same shall become due, principal and interest may become due and payable at the option of the payee or holder of said note, subject to the conditions of that certain trust agreement by and between the makers, payee and endorser hereof and W. R. Castle, dated June 8, A. D. 1908;" that on or about July 22, 1908, the conditions of the trust agreement respecting the notes, as well as in all other respects, having been fulfilled and all matters adjusted between the parties, the note in question was duly delivered to the plaintiff with the clause therein reading, "subject to the conditions of that certain trust agreement by and between the makers, payee and endorser hereof and W. R. Castle, dated June 8, A. D. 1908," revoked and canceled by W. R. Castle, trustee, in accordance with the authority conferred upon him by the terms of the trust agreement; that upon final adjustment of all matters between them being thus had, and after all claims against Scott and his wife for advances made and expenses incurred in the cultivation and harvesting of the cane were deducted from the sum of \$93,000, the estimated purchase price of the property, there remained to the plaintiff the note in question for the sum of \$2000 and to Scott the balance of about \$1200; that the defendants thereafter being "in default in the payment of * * * interest within thirty days after the same * * * became due," and the plaintiff having notified them of her intention to declare the note, principal and interest, due and payable, the defendants promised, in consideration of the plaintiff agreeing to wait for payment of the principal until

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the maturity date of the note, to pay interest thereon at the rate of 8% per cent per annum, the date on which the latter rate of interest was to begin to accrue, as found by the trial court, was April 30, 1911. Upon the facts thus recited and which are supported by evidence the plaintiff was entitled to judgment.

The defendants contended in the lower court that the note in question was not delivered to the plaintiff in accordance with the terms of the trust agreement, but by mistake; that there was no default in the payment of any interest; that the note was not presented for payment; and that payment was not refused. But in this court no reliance was placed upon these contentions and apparently they were abandoned by counsel. A further contention was made that there was no agreement to pay interest at the rate of 8% per annum. This was a question peculiarly within the province of the trial judge to determine, and there being evidence tending to support the ruling upon it we cannot question the decision of the court thereon.

The record, as respects the oral evidence, is meager and does not purport to be complete. It appears that the clerk (there being no stenographer) attempted to take down the testimony in longhand, but, obviously, he failed in some instances to get down even the gist of what the witnesses said. The trial judge, however, heard all the testimony and having considered it in connection with the documentary evidence in the case, we cannot say that his rulings upon questions of fact were not sustained by the evidence.

The defendants' chief contention, however, is, that the plaintiff is indebted to the Kona Development Company, one of the defendants, in the sum of \$1702, which indebtedness they attempt to set up as a partial defense to the plaintiff's claim, whether by way of set-off, recoupment, or otherwise, it does not clearly appear. This alleged indebtedness they seek to base upon a certain judgment for the sum of \$1702 which

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was rendered in an action brought by B. F. Dillingham against M. F. Scott, and against the Kona Development Company as garnishee, which judgment was subsequently assigned by Dillingham to the Kona Development Company. The theory of counsel being, as we understand them, that all the property conveyed in accordance with the terms of the trust agreement belonged solely to M. F. Scott; that the plaintiff had no interest therein; and that upon the final settlement the note in question, though the plaintiff was named as payee therein, was the property of M. F. Scott, or a gift by him to his wife. Hence, they argue, that it is immaterial that the note was made payable to the plaintiff, as no consideration moved from her, and that the rights of the defendants are the same as if the note had been made payable to M. F. Scott. However sound this argument might be under other circumstances, it has no application to the facts in this case as we view the matter. The record before us is clear that Mrs. Scott was the owner of valuable property interests which she conveyed in accordance with the terms of the trust agreement together with her husband; and that the note delivered to her was for a valuable consideration moving from her. The note thus became her individual property and free from any claim which the defendants may have against her husband. The record is clearly against the contention of the defendants. They have no claim against the plaintiff by reason of the Dillingham judgment.

The defendants also contended in the lower court that they had a claim against Mrs. Scott by reason of the fact that she became surety on an appeal bond for her husband in his appeal to this court in the Dillingham case whereby the judgment alluded to was affirmed, which claim they contend they were entitled to set up as a defense in the present action. Presumably this contention has been abandoned, as no argument, either oral or in their brief, was made by the defendants in this court.

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A further contention is, that the decision of the trial judge fails to comply with the requirements of Act 117, Laws of 1909, which provides that the "court shall hear and decide the cause, both as to the facts and the law, and its decision shall be rendered in writing stating its reasons therefor." The sufficiency of the decision in this respect was not questioned in the lower court. It is now questioned for the first time in this court. No proper exception to the decision was saved. The exception taken was, that the defendants "except to the decision" of the court. This was not sufficient to raise the question as to the sufficiency of the decision rendered. *Kaehu v. Namealoha*, 20 Haw. 350. One of the essential purposes of an exception is, that the attention of the trial court is thereby specifically called to a particular point of law going to the legal sufficiency of the ruling made, thus affording the court an opportunity to correct the supposed error. That opportunity was not given to the court by the exception taken in this case.

Having examined the entire record, as well as all the questions presented by counsel and finding no error in the record, the exceptions are overruled.

M. F. Scott for plaintiff.

D. L. Withington (*Castle & Withington* on the brief) for defendants.

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LORRIN ANDREWS *v.* THE HONORABLE WILLIAM L. WHITNEY, SECOND JUDGE OF THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT OF THE TERRITORY OF HAWAII, AND ESTELLE ANDREWS.

PETITION FOR WRIT OF PROHIBITION.

ARGUED AUGUST 23, 1912.

DECIDED SEPTEMBER 6, 1912.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

DIVORCE—alimony—misconduct of wife.

Upon a divorce granted upon the sole ground of the desertion of the wife the court rendering the decree is without jurisdiction to award alimony.

COURTS—jurisdiction—by consent.

In such a case consent of the parties is ineffectual to give the court power to award alimony.

CONTEMPT—disobedience of void order.

A commitment for an alleged contempt which consists in the disobedience of an order made without jurisdiction is void.

PROHIBITION—contempt proceedings—void order.

A writ of prohibition may be issued to prohibit a divorce court from enforcing by proceedings for contempt a void order for the payment of alimony.

OPINION OF THE COURT BY PERRY, J.

In a suit for divorce in which the present petitioner was libellant a decree was entered granting a divorce from the bonds of matrimony on the sole ground of the wife's desertion. The libellee had answered denying the truth of the allegation of desertion and was represented by counsel at the trial. No cross-libel was filed. By stipulation of the parties, however, a provision was entered in the decree ordering the libellant to pay alimony to the libellee in a stated sum monthly beginning with February 1, 1912. Thereafter, the husband failing to pay part

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of the sums required under this provision of the decree, upon motion of the libellee the circuit judge issued an order requiring the libelant to show cause why he should not be adjudged guilty of contempt of court for the failure to pay. The libelant moved to quash the order to show cause, the motion being based upon the ground that the original order for alimony was beyond the jurisdiction of the court and that the court was equally without power to enforce by contempt proceedings compliance with that provision of the decree. After argument the motion was overruled, leave for an interlocutory appeal denied and a time appointed for the hearing upon the order to show cause. Thereupon a writ was sued out from this court prohibiting the libellee and the trial judge from further attempting to enforce the order for alimony. The prayer is that the writ be made perpetual. To the petition for the writ of prohibition one of the respondents demurred and the other answered, both claiming that the petition on its face shows that the order for alimony was not beyond the jurisdiction of the court.

The main question in the case is as to the validity of the order referred to. R. L., Sec. 2237, provides that "upon granting a divorce for the adultery or other offense amounting thereto, of the husband, the judge may make such further decree or order against the defendant compelling him * * * to provide such suitable allowance for the wife for her support as the judge shall deem just and reasonable, having regard to the ability of the husband, the character and situation of the parties, and all other circumstances of the case." The language of this section is clear and unambiguous. The authority to award alimony is expressed to be conferred "upon granting a divorce for the adultery or other offense amounting thereto, of the husband." The section purports to state with fulness all of the power of the trial judge in a divorce proceeding to award alimony. The maxim *enumeratio unius est exclusio alterius* applies. The authority to award alimony upon granting a divorce for the misconduct of the wife is by the language used clearly negated.

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Other considerations strengthen this view of the construction of the statute and of the intention of the legislature. No other provision in our statutes points to the existence of the power in our divorce courts to grant alimony as an incident to a decree for the fault of the wife. R. L., Sec. 2244, expressly provides that "a wife divorced for adultery or other offense amounting thereto, shall not be entitled to dower in her husband's estate, or any part thereof, nor to any share of his personal estate." The phrase "other offense amounting thereto" used in the section just quoted and in section 2237 is the equivalent of "any other ground for divorce." *Correra v. Correra*, 19 Haw. 326, 328. And it is settled law in this jurisdiction that even during the existence of the marriage relation the wife forfeits her right to support by her husband if she lives apart from him without just cause. *Forrester v. Hurtt*, 18 Haw. 215; *Dole v. Gear*, 14 Haw. 554. The doctrine of alimony is based upon the common law obligation of the husband to support his wife and our law, written and unwritten, is consistently to the effect that neither during marriage nor after dissolution of that relation, whether by divorce or by death, does that obligation exist if the wife has without cause ceased to live with her husband or committed some other breach of her duty to him constituting ground for divorce.

There is much in the authorities as well as in reason in support of this view. Blackstone, writing with reference to the common law, said: "No alimony will be assigned in case of a divorce for adultery on her part, for as that amounts to a forfeiture of her dower after his death it is also a sufficient reason why she should not partake of his estate when living." 3 Blackstone's Com., 94. "So long as he has committed no breach of marital duty he is under no obligation to provide her a separate maintenance; for she cannot claim it on the ground of her own misconduct. Such is the result of the principles of the unwritten law. And such is justice." 2 Bishop, Marriage and Divorce (6th ed.), Sec. 377. "In the absence of statute the

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rule is inexorable that no alimony can be allowed where a divorce is granted for the fault of the wife." *Glynn v. Glynn*, 8 N. D. 233. "Generally speaking, alimony is not allowed unless the decree of divorce is in the wife's favor. In many jurisdictions, however, the general rule has been modified by statute expressly or impliedly providing that permanent alimony may be awarded in favor of the wife although a decree has been rendered against her." 14 Cyc. 767. "As the right to permanent alimony, so far as it depends on general law, is founded upon the duty of the husband to support the wife, it therefore legally, as well as logically, follows, that when this duty ceases the right also ceases. Hence it is generally held, in the absence of statutory provisions controlling the question, when the husband obtains a divorce on account of the misconduct of the wife, the latter will not be entitled to alimony. * * * Looking at the question on principle, the rule is certainly in harmony with other general rules governing the marital relation, as, for instance, the common law duty of the husband to support the wife is not absolute. He is bound to support her at their common home, and not under another's roof, unless his own improper conduct has forced her to seek shelter elsewhere. Hence if she abandons her home without cause, the right to support from her husband at once ceases. If, then, while the marital relation still exists, the husband is under no obligations to support the wife when she is without cause living apart from him, and particularly when living in criminal relations with another, *a fortiori* he will not be liable for her support after he has obtained a divorce from her on account of her desertion and adultery." *Spitler v. Spitler*, 108 Ill. 120, 124. See also 1 Bishop, Marriage and Divorce 573; *Palmer v. Palmer*, 1 Paige 276; *Waring v. Waring*, 100 N. Y. 570; *Everett v. Everett*, 52 Cal. 383, and *Allen v. Allen*, 43 Conn. 419.

Cases from Kentucky are cited by the respondents as authority for the position that under a statute similar to ours an order of alimony may be validly made upon a divorce for default of

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the wife. These cases are perhaps distinguishable on the ground of dissimilarity in the provisions of the statutes, but if they are not we decline to follow them.

The legislature did not confer on the divorce court authority to make the order under consideration. It is equally clear that the consent of the parties was ineffectual to give the court the requisite power. "It is an elementary principle that consent of parties cannot give a judge or court jurisdiction of the subject matter of a controversy." *Holloway v. Brown*, 14 Haw. 170, 175. See also *Estate of Bishop*, 11 Haw. 33, and *Tong On v. Tai Kee*, 11 Haw. 424. And that which cannot be done directly cannot be accomplished indirectly. The petitioner is not estopped by his alleged consent to set up the invalidity of the order.

The order for payment being void a commitment for contempt based upon its disobedience would be likewise in excess of the jurisdiction of the court and invalid. It is as though no order had been made. *Ex parte Pahia*, 13 Haw. 575, 578.

The only remaining question is whether prohibition lies, the respondents urging that it does not and basing their contention on the ground that another remedy, by appeal, is open to the petitioner. Our statutes define the writ of prohibition and the circumstances under which it may be issued and made perpetual. R. L., Sec. 2023, reads: "This is a mandate which issues in the name of the Territory from the supreme court, or from any justice thereof, or a circuit judge, directed to the judge and the party suing in any inferior court, forbidding them to proceed any further in the cause, on the ground that the cognizance of the said cause does not belong to such court, or that the cause or some collateral matter arising therein is beyond its jurisdiction, or that it is not competent to decide it." The only allegations required in the petition are those stating the cause and nature of the action brought against the petitioner in the trial court and showing "that the inferior court is not competent to try it or that it has exceeded its jurisdiction

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in the trial or hearing of such action" and that the court issuing the writ is authorized to make it perpetual if it "shall be of the opinion that the applicant has made out his case. Under section 688 of the Revised Statutes providing that "the Supreme Court shall have power to issue writs of prohibition to the District Courts when proceeding as courts of admiralty and maritime jurisdiction," the supreme court of the United States declares that "the writ thus provided for * * * is the common law writ" and, while saying that "whether the granting or refusal of the writ is discretionary or demandable of right has been much debated," holds that the issuance of the writ is discretionary "where there is another legal remedy, by appeal or otherwise, or where the question of the jurisdiction of the court whose action is sought to be prohibited is doubtful, or depends on facts which are not made matter of record, or where a stranger, as he may in England, applies for the writ of prohibition. But where that court has clearly no jurisdiction of the suit or prosecution instituted before it, and the defendant therein has objected to its jurisdiction at the outset, and has no other remedy, he is entitled to a writ of prohibition as a matter of right." *In re Cooper*, 143 U. S. 472, 494, 495. See also *Smith v. Whitney*, 116 U. S. 167, and *In re Rice*, 155 U. S. 396, 403. To what extent our statute differs in effect from section 688 of the Revised Statutes we need not say. It at least does not require a refusal of the writ in every instance in which the question of jurisdiction may be finally determined on appeal in the original proceeding in which further action is sought to be prohibited. Assuming, in favor of the respondents, that the doctrine of the supreme court of the United States is applicable in Hawaii, we think that this is a case in which the writ was properly issued and should be made perpetual. Reason supports the issuance of a writ in such a case as this irrespective of whether an adjudication of contempt would be appealable. "An appeal could only be resorted to after judgment. It would not prevent the unjust proceeding prior

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thereto or the expense, vexation and annoyance of a trial, and an appeal would subject the applicant to the necessity of taking all the preliminary steps therefor. * * * The writ of prohibition is preventive and not remedial in its nature and therefore is the appropriate writ to arrest the unauthorized proceeding prior to judgment as well as after it, always, however, looking to the future and not to the past." *People v. Carrington*, 5 Utah 531, 533. "The parties to the action should not be put to the cost and inconvenience of going through the farce of a trial which could do neither party any good." *The People v. District Court*, 28 Colo. 161, 165. See also *State v. Wilcox*, 24 Minn. 143, 147.

Whether the libellee in the suit for divorce can otherwise than by contempt proceedings recover upon the husband's alleged contract to pay is a question which does not arise in the case at bar.

The writ will be made absolute.

R. P. Quarles and E. Murphy for petitioner.

J. Lightfoot for respondents.

JACOB COERPER v. MANUEL GOUVEIA.

APPEAL FROM DISTRICT MAGISTRATE OF NORTH KONA.

SUBMITTED AUGUST 27, 1912.

DECIDED SEPTEMBER 6, 1912.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

LANDLORD AND TENANT—*summary proceedings—affidavit to oust jurisdiction of district court.*

An affidavit in the district court, in support of a plea that title to real estate is involved, is insufficient under supreme court rule 15 when no facts are alleged showing title in the defendant or in some third party under whom he claims.

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Id.—necessary proof of plaintiff—defense by defendant.

In an action for summary possession it is incumbent on plaintiff to show that the relation of landlord and tenant exists between himself and defendant and that he is entitled to immediate possession. Defendant may show in defense any fact which tends to disprove plaintiff's alleged right to recover. He may show that the relation of landlord and tenant has ceased to exist, and that the landlord's title has terminated. Even though the evidence offered in defense may bring the title in question, it does not necessarily follow that such evidence is, for that reason alone, inadmissible. However, under the provisions of section 1662 R. L. the jurisdiction of the district court ceases the instant it is discovered that the title to real estate has come in question.

OPINION OF THE COURT BY DE BOLT, J.

This is an appeal by the defendant on points of law from a judgment of the district court of North Kona, county of Hawaii, in an action brought by the plaintiff against the defendant for the summary possession of certain described premises, the judgment being that the plaintiff recover the possession of the premises and his costs.

The declaration filed in the action avers, in substance, that the plaintiff is the landlord and owner of and entitled to the immediate possession of the premises, which the defendant is in possession of and holds unlawfully and against the right of the plaintiff; that on or about January 1, 1910, "the defendant * * * entered upon and took possession * * * of the premises as a tenant at will of the plaintiff under and by virtue of permission by parol * * * and the defendant ever since * * * has held * * * possession of said premises as aforesaid; that the plaintiff, being desirous to * * * repossess the * * * premises," on May 11, 1912, "by a notice in writing * * * duly notified said defendant * * * to quit possession of said premises and deliver possession thereof to the plaintiff, but he has detained and still detains the same by holding over after the termination of said tenancy by will, as aforesaid."

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The defendant having refused to comply with the notice to quit the possession of the premises, the plaintiff thereupon instituted this action.

The summons issued in the action was made returnable at 10 a. m., May 27, 1912, at which time the defendant appeared and filed a plea to the jurisdiction of the court, which, in substance, denied that the relation of landlord and tenant existed or had existed between the plaintiff and the defendant at any time mentioned in the declaration, and also denied that the plaintiff was the owner of the premises and entitled to the possession thereof. The plea was accompanied by an affidavit of the defendant, setting forth numerous facts as to the title of the premises, concluding with the statement, that the Kona Development Company, Limited, was the owner thereof. The affidavit was silent, however, as to any title in or possession of the premises by the defendant, or that he was the tenant of, or holding under any person claiming adversely to the plaintiff. The affidavit, therefore, did not, as required by rule 15 of the rules of this court, set forth "the source, nature and extent of the title claimed by defendant." It was clearly insufficient and the court properly overruled the plea. *Territory v. Kapiolani Est.*, 18 Haw. 640, 642, 643.

Upon the plea to the jurisdiction being overruled the defendant filed an answer of general denial, with notice of intention to "rely on the defense of illegality, fraud, release, payment, satisfaction, and also on the termination of the plaintiff's right to possession, if any such right ever existed."

The trial thereafter proceeded, resulting, as above mentioned, in a judgment for the plaintiff.

During the course of the trial the defendant, on cross-examination of the plaintiff, as well as by the offer of affirmative testimony in defense, sought to establish the facts that the relation of landlord and tenant had ceased to exist between them, and that the title to the premises was no longer in the plaintiff, but in another who had evicted the defendant, under whom he

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then held possession and to whom he had attorned as the holder of the paramount title. The court sustained the plaintiff's objection to all this evidence, holding that it was inadmissible on the ground that, if admitted, it would be permitting a tenant to dispute his landlord's title. This ruling was erroneous. The evidence offered by the defendant was clearly admissible. The facts that the defendant thus sought to establish were not in conflict with the general rule of law that a tenant cannot dispute his landlord's title, but they were such as could properly be shown in an action of this kind in defense.

In an action for summary possession it is incumbent on the plaintiff to show by competent evidence that the relation of landlord and tenant exists between himself and the defendant and that he is entitled to the immediate possession of the premises, otherwise he cannot recover. 24 Cyc. 1407, 1410, 1438, 1439; 12 Ency. Pl. & Pr. 868, 870; 2 Taylor L. & T., §§720, 720a, 8th ed. This being true, it follows that the defendant may show in defense any fact which tends to disprove the plaintiff's alleged right to recover the possession of the premises. He may show that the relation of landlord and tenant has ceased to exist between them, and that the landlord's title has terminated. 24 Cyc. 1401, 1421. This right of defense on the part of one in possession of premises as tenant was considered in *Maile v. Chin Wo Co.*, 10 Haw. 289.

In an action for summary possession, even though the evidence offered in defense may bring the title to the premises in question, it does not necessarily follow that such evidence is, for that reason alone, inadmissible. However, as section 1662, R. L. provides that district courts "shall not have cognizance of * * * actions in which the title to real estate shall come in question," the jurisdiction of the court ceases the instant it is discovered that "the title to real estate" has come in question.

The question of title is generally presented by plea and affidavit before the trial begins, as the defendant attempted to do in this case, but the fact may afterwards be disclosed on the

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trial of the case by the evidence introduced. It is immaterial, however, at what stage of the proceedings the fact is disclosed, for at that instant the proceedings must be arrested, because the court is then without jurisdiction to proceed further in the case. *Parker v. Bussell*, 3 Blackf. (Ind.) 411, 415; 12 Ency. Pl. & Pr., 675, 676, 677, 679; 11 Cyc. 699, 701.

The judgment is reversed and the case is remanded to the district magistrate for further proceedings therein not inconsistent with this opinion.

Defendant in person.

JAMES CARTY *v.* WILLIAM P. JARRETT, SHERIFF
CITY AND COUNTY OF HONOLULU.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED AUGUST 21, 1912.

DECIDED SEPTEMBER 6, 1912.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

ESTOPPEL—*nature of representation essential to constitute an estoppel in pais.*

A representation in order to give rise to an estoppel need not necessarily have been made directly to the person claiming the estoppel with the intention that he in particular should act upon it. It is enough that it was made under such circumstances as would warrant the assumption that the party making the representation must have understood that one knowing of it might reasonably believe it to be true and act upon it. A representation may consist of acts and conduct as well as of words, but in any case, in the absence of a fraudulent intent, the act, conduct or words must have been so clear, definite and unambiguous as to cause one, as a reasonable person, to form a belief of an existing fact.

SAME—*when question of law.*

When the facts which are claimed to constitute an estoppel are undisputed the question whether an estoppel exists is one of law.

Carty v. Jarrett, 21 Haw. 274.

Costs—liability of sheriff for.

In an action of replevin brought against a sheriff to recover property held by him under a writ of attachment issued in an action between private persons where the plaintiff obtains judgment the costs may be taxed against the defendant.

OPINION OF THE COURT BY ROBERTSON, C.J.

This is an action of replevin to recover possession of five certain horses held by the defendant under a writ of attachment issued from the circuit court of the first judicial circuit in an action of assumpsit there instituted by the Club Stables, Limited, against H. Hordorn on the 30th day of June, 1911. The verdict was for the plaintiff for the restitution of the horses, and \$64 damages. It appeared in evidence that the horses in question which were included in a shipment of animals arrived at Honolulu by steamer from San Francisco in charge of said Hordorn on June 27th. Upon their arrival the animals were placed in quarantine at the government corral pursuant to requirements of the regulations of the territorial board of agriculture and forestry, division of animal industry. The writ of attachment was served by the sheriff on July 7th, but the horses remained at the government corral in charge of the quarantine officials until the expiration of their term of quarantine. The plaintiff claimed ownership of two of the horses by purchase from one McWayne through Hordorn on July 5th, and, as to the other three, by bill of sale from one Nakamoto who claimed to have purchased them from McWayne through Hordorn on the same date. There was evidence sufficient to justify the jury in finding that the horses belonged solely to McWayne; that Hordorn was merely in McWayne's employ and had no interest in the horses, but that Hordorn was authorized to sell the horses and to sign McWayne's name when necessary, with instructions to deposit any moneys received through any sale to McWayne's credit. There had been no delivery, actual or constructive, of the horses to Carty or Nakamoto. The questions whether Hor-

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dorn had any ownership in the horses, and whether the sales to Carty and Nakamoto were executed and complete or merely executory or conditional were left to the jury under proper instructions, and we cannot disturb their findings as to those points.

The theory of the defendant was and is that the evidence (which was undisputed) that McWayne had consigned the horses to Hordorn and McWayne and had caused them to be listed with the quarantine officials under the names of Hordorn and McWayne constituted a holding out or representation that Hordorn was a joint owner with himself of the animals; that the Club Stables corporation was justified in acting upon the representation; that it did rely on the representation, in connection with other facts which will be noted, in causing the attachment to be levied on the animals; that as no delivery had been made to the alleged purchasers the attachment was good as against them; that McWayne is estopped to deny the truth of the representation; and that Carty and Nakamoto are also bound by the estoppel.

There was no evidence in the case that either Carty or Nakamoto were aware of the representation upon which the Club Stables, Limited, claimed to have acted. The receipts given them for the moneys paid on account of their respective purchases were signed "McWayne by Hordorn." But, assuming that in the absence of any delivery of the horses to the purchasers the intervening attachment might have been effective, it will be noticed that the contentions of the defendant have for their basis the alleged estoppel against McWayne. If there was no estoppel there is nothing to support the defendant's theory.

The testimony showed that in a conversation between McWayne and Hordorn at the former's home on the Island of Hawaii the parties agreed to engage in a joint venture having for its object the purchase on the mainland of mules for importation to and sale in this Territory; that each party was to furnish a like sum of money and would share equally any profits

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or losses; that Hordorn had no ready money but would provide it after arrival on the mainland; that upon this understanding the parties proceeded to California and Oregon, McWayne paying Hordorn's travelling and hotel expenses; that Hordorn failed to furnish any money, being unable, evidently, to do so; that McWayne told Hordorn that under the circumstances it would not be fair to share the probable profits, saying that "that part of it was off;" that Hordorn said he was willing to do anything and that if McWayne would give him a suit of clothes once in a while and provide him with food he would be willing to take whatever McWayne might give him at the conclusion of the venture; that McWayne replied "I will do what is right by you;" that Hordorn received some money and a suit of clothes from McWayne; and that after the arrival of the horses at Honolulu McWayne gave Hordorn five hundred dollars for his services. The testimony further showed that McWayne bought some horses and mules and sent them from San Francisco by steamer to Honolulu in charge of Hordorn as above stated; that the animals were subjected to the mallein test at San Francisco by the officials of the United States department of agriculture, bureau of animal industry, with whom they were listed in the names of "Hordon and McWayne." McWayne testified in effect that, as he intended to take passage by a subsequent steamer and would not reach Honolulu until after the arrival of the animals, he had listed and shipped the animals in their joint names in order that Hordorn should have no difficulty in his (McWayne's) absence in taking the necessary steps with reference to the landing of the animals at Honolulu and their care and control. It appears that McWayne arrived at Honolulu on the 6th or 8th of July. It was also in evidence that prior to leaving for the mainland McWayne told certain persons at Kailua, Hawaii, that he and Hordorn were going to purchase stock. Mr. Bellina, the president of the Club Stables corporation, testified that he had heard that McWayne and Hordorn had gone to the mainland together to buy stock; that he knew, when he

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caused the issuance of the writ of attachment, that stock had arrived in Honolulu in the names of Hordorn and McWayne, and that the animals had been tested in San Francisco and entered at quarantine in Honolulu in the names of Hordorn and McWayne; that he had heard that Hordorn had put \$4000 or more into the venture; and that he believed that Hordorn had a one-half interest in the animals. He did not claim to have received any of this information from McWayne. On these facts we think that McWayne was not estopped from denying that Hordorn was a joint owner of the animals and from claiming sole ownership in himself. There being no conflict in the evidence the question whether an estoppel has been proven is one of law.

A representation in order to give rise to an estoppel need not necessarily have been made directly to the person claiming the estoppel with the intention that he in particular should act upon it. It is enough that it was made under such circumstances as would warrant the assumption that the party making the representation must have understood that one knowing of it might reasonably believe it to be true and act upon it. A representation may consist of acts and conduct as well as of words, but in any case, in the absence of a fraudulent intent, the act, conduct or words must have been so clear, definite and unambiguous as to cause one, as a reasonable person, to form a belief of an existing fact. In the nature of things each case must stand largely on its own facts, and it will serve no useful purpose to review the many cases cited in the defendant's brief, some of which at first sight perhaps tend to support the claim of an estoppel in this case, but we think they will be found upon examination to be consistent with the view we have adopted. The testimony of McWayne appears to us to contain a consistent and satisfactory reason for consigning and listing the animals in the names of Hordorn and McWayne, and if this be so, it shows that such consigning and listing does not necessarily amount to a declaration of joint ownership of the animals by the persons whose

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names have been so used. It is consistent with the fact of ownership in one of the persons named, and, indeed, is not necessarily inconsistent with ownership in a stranger. Under such circumstances it cannot be said that the representation amounts to such a clear and unambiguous statement that the property is jointly owned as would justify one in assuming it to be such and acting on it. The placing of one's property in the possession of another is an ambiguous act. It may indicate a change of ownership, but it is nevertheless consistent with the retention of ownership. One's rights of ownership are not lost or impaired because he has loaned or rented his property to another person, nor because he has sent it to another place in charge of a servant.

From what has been said it is apparent that an exhaustive review of the many exceptions is unnecessary. If any error occurred in instructing the jury on the subject of constructive delivery or as to the question of estoppel and its effect on plaintiff's claim of ownership, it was, under the circumstances, harmless, as upon the undisputed facts we find the defendant's claim of estoppel to be untenable.

Costs were taxed against the defendant in the court below in the sum of \$41.50, including the costs of court, attorney's costs, and witness' fees. The defendant excepted to this, and urges that the case is within the statute (Sec. 1, Act 63, Laws of 1907) which provides that no officer "acting in his official capacity on behalf of the Territory or any County or Municipality thereof shall be taxed costs" etc. The contention cannot be sustained. The defendant, in attaching the horses, acted in his official capacity; he holds possession of them in that capacity; and he is sued in this action as sheriff of the city and county of Honolulu; but in levying the writ and taking and holding possession of the animals he did not act on behalf of the Territory or the municipality, but on behalf of a private corporation, the Club Stables, Limited. The case does not fall within the statute. The costs were properly taxed.

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All of the exceptions have been considered and they are overruled.

W. B. Lymer (*Thompson, Wilder, Watson & Lymer* on the brief) for plaintiff.

E. C. Peters for defendant.

KANEOHE RANCH COMPANY, LIMITED, A CORPORATION, *v.* KANEOHE RICE MILL COMPANY, LIMITED, A CORPORATION; H. HACKFELD & COMPANY, LIMITED, A CORPORATION; A. HANEBERG, ADMINISTRATOR OF THE ESTATE OF L. AHLO, DECEASED; NANNIE R. RICE AND DAVID RICE, HER HUSBAND; LAHELA AHLO; ANTHONY AHLO; S. N. CASTLE ESTATE LIMITED; TERRITORY OF HAWAII; BATHSHEBA M. ALLEN; THE RIGHT REVEREND LIBERT HUBERT BOEYNAEMS, BISHOP OF ZEUGMA; J. A. MAGOON; ON TAI KEE, WONG HUNG YEE, CHUN SAU MUN, LUM HOO, LUM FAT, LUM YICK CHONG, YIM CHON HANG, YIM TIN KONG, YIM HOY, LUM MOK CHEE, AND C. LAI YOUNG, MANAGER, COPARTNERS UNDER THE NAME AND STYLE OF SUN TAI WAI; MAIKAI ALOIAU; HALEAKA MAKAOINI; BRUCE CARTWRIGHT, TRUSTEE OF THE ESTATE OF E. KALELEONALANI; WILLIAM HENRY; B. R. BANNING; W. G. IRWIN; DORA L. EMERSON; E. A. McINERNY, W. H. McINERNY AND J. D. McINERNY, TRUSTEES UNDER THE WILL OF M. McINERNY, DECEASED; HENRY H. PARKER, WONG LEONG; AUKAI; SOPHIA K. WILEY; LAPEKA POEPOE; JOHN BELL; MARY K. PAHAU;

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MRS. J. T. DOWNEY; CHARLES SILVA; CHONG LUM SUP; GEORGE WATSON; ROWLAND WATSON; JACOB WATSON; EMMA KEAKAHIWA; MARIA LIILII; CHING ON; KALUA KAPUKINI; M. WAHINEOKAI; CHARLOTTE A. CARTER; MARY A. CARTER; ALFRED W. CARTER, TRUSTEE FOR RACHAEL A. CARTER; J. O. CARTER; HENRY C. CARTER; SARAH C. BABBITT; J. S. B. PRATT, SR., AND J. S. B. PRATT, JR., JOSHUA D. PRATT, HESTER PRATT, CATHERINE PRATT, DUDLEY PRATT AND LAURA M. PRATT, MINORS; EMILIA SILVA; THOMAS SILVA; SARAH SILVA; ROSIE O'HARA; MARY ANN HORNER; HATTIE DOAK; JOSEPH SILVA, EMILIA SILVA, JOHN SILVA AND GEORGE SILVA, MINORS; AND JOHN DOE, RICHARD ROE, MARY BLACK, RACHAEL BLUE, JOHN OAHU, SAMUEL MAUI AND JAMES HAWAII, UNKNOWN OWNERS AND CLAIMANTS.

TAXATION OF COSTS.

ARGUED SEPTEMBER 5, 1912.

DECIDED SEPTEMBER 11, 1912.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

COSTS—division of, in water rights cases.

In a water rights case the costs accrued in this court on appeal from a ruling of the commissioner sustaining the demurrers of certain respondents may in the discretion of the court be divided, under the statute, in accordance with the circumstances of the case.

OPINION OF THE COURT BY PERRY, J.

(Robertson, C.J., dissenting.)

This was a proceeding for the adjudication of water rights

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under chapter 1439 of the Revised Laws as enacted by Act 56 of the Laws of 1907. To the third (amended) petition certain of the respondents answered and others, including the Territory of Hawaii, demurred and the demurrers were sustained by the circuit judge sitting as commissioner of water rights. Upon appeal to this court certain of the grounds of demurrer were overruled, the others the court deemed unnecessary to determine, the order appealed from was reversed and the cause remanded for further proceedings not inconsistent with the opinion. 20 Haw. 658. Thereafter a lengthy trial was had at the conclusion of which the commissioner found that no controversy existed between petitioner and certain of the respondents who had demurred and adjudicated the rights of the respective parties in other instances, his determination upon the main issues being favorable to the petitioner and adverse to the Kaneohe Rice Mill Company and to the Territory. From that decree an appeal was taken to this court by the Kaneohe Rice Mill Company and subsequently withdrawn. The petitioner now presents a bill of costs, amounting in all to \$55.45, incurred in consequence of the appeals from the order sustaining the demurrer, and asks that the costs be taxed against all the respondents who prosecuted appeals from that order.

Section 2203, R. L., as amended by Act 56, L. 1907, provides that in water rights cases "the costs may, in the discretion of the judge," who sits as commissioner, "be divided, or taxed to the losing party" and that "in case of appeal" to the supreme court "the final award as to costs shall abide the decision of the court." This power to apportion the costs in accordance with the requirements of justice in view of the circumstances of each particular water case is, in our opinion, vested in this court on appeal as fully as it is in the commissioner at the trial. Certainly if the appeal from the final decree had been prosecuted, this court would have been under the statute authorized to adjust the costs in question and all other costs in the case in view of the circumstances. The mere absence of an appeal concern-

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ing the main issues does not operate to lessen our power or to render applicable the stricter rule followed in ordinary actions or suits.

The respondents who were found by the commissioner to have had no controversy with the petitioner should not be required to pay any of the costs under consideration. The only respondents not in that category are the Territory of Hawaii and the Kaneohe Rice Mill Company. These two should bear these costs equally, but since costs cannot be taxed against the Territory (Act 63, L. 1907) one half of the amount of the bill is taxed against the Kaneohe Rice Mill Company and the loss as to the other half will remain on the petitioner where the law has placed it.

D. L. Withington for petitioner.

A. A. Wilder, W. L. Stanley and *C. R. Hemenway*, on behalf of *W. W. Thayer*, for certain respondents.

DISSENTING OPINION OF ROBERTSON, C.J.

In order to a proper understanding and decision of the question involved here the section of the statute (R. L. Sec. 2203) must be read in its entirety for it is only upon such a reading that the intent of the legislature can be gathered. The section, as amended by Act 56 of the Session Laws of 1907, provides that "There may be taxed as costs in cases arising hereunder, besides the usual statutory costs as allowed by district courts for service, summons, oaths and otherwise, not over twenty cents a folio for copies of the evidence and decision either on appeal or as furnished to any party. The costs may, in the discretion of the judge, be divided, or taxed to the losing party. In case of appeal the final award as to costs shall abide the decision of the court." It is clear to my mind that the appeal referred to in that section is a general appeal involving the merits of the controversy for it is only upon such an appeal that the items of costs which are specifically mentioned would come before this court for review. And so in the case at bar, the plaintiff hav-

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ing brought an appeal from an order sustaining demurrers, the only costs involved and the only costs which the plaintiff asks to have taxed are the costs of this court which were incurred in the proceeding in which the appellant prevailed. Under these circumstances I hold that the costs should be taxed in favor of the plaintiff and against the unsuccessful demurrants other than the Territory which is exempt. In other words, the costs should be taxed in favor of the party prevailing in this court against the unsuccessful parties, excepting, of course, the Territory, as in an ordinary action. I therefore dissent from the view taken by the majority.

MILDRED BRUNS v. HENRY C. BRUNS.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED SEPTEMBER 16, 1912.

DECIDED SEPTEMBER 25, 1912.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

DIVORCE—*extreme cruelty*.

Extreme cruelty, as a ground of divorce, implies physical injury either actual or apprehended. Personal violence need not be shown, but a state of unhappiness involving mental suffering which is not such as to impair the health does not amount to extreme cruelty.

OPINION OF THE COURT BY ROBERTSON, C.J.

Mildred Bruns filed her libel praying for an absolute divorce from her husband, Henry C. Bruns, alleging extreme cruelty on the part of the libellee.

The circuit judge, at the conclusion of the testimony adduced by the libelant, dismissed the libel on the ground that the testimony did not prove the alleged extreme cruelty. This appeal is from the decree of dismissal. Physical violence, actual or

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threatened, was neither alleged nor sought to be proved, but the case alleged and sought to be made by the libelant was a course of conduct on the part of the libellee which, it was alleged and claimed, had rendered the libelant hysterical and unhappy and as a result thereof she had become run down and weak, and that her life had become unbearable.

The evidence adduced in support of the libel consisted of the testimony of the libelant and her mother. Much of the testimony was remote, trifling and irrelevant and we deem it unnecessary to review it at length. It appears that the parties were married at Honolulu on the 7th day of June, 1910; that on the 8th day of April, 1911, Mrs. Bruns gave birth to a son; and that the libellee left his wife in December 1911. The libelant, who appears to be possessed of a passive, undemonstrative disposition, was described by her mother as a girl who could not cook, or sew, or do housework; and one who had been brought up extravagantly, was accustomed to have everything, could not deny herself, could not get along like other girls, and would feel hurt and wounded if she did not get things she wanted. The libellee was a United States deputy marshal whose only income was a salary of one hundred and sixty-six dollars a month. According to the testimony of his wife and mother-in-law he was of a cold and unaffectionate disposition, moody, and, at times, sulky and ill-natured. The young couple did not get along happily. The libelant evidently became dispirited, and she cried at times. She testified that she could not eat and was unable to sleep. But the testimony was very indefinite as to the extent to which she was affected in these respects. There was no clear showing that her health became impaired by reason of her husband's conduct. Much of her discomfort doubtless resulted from her pregnancy and the ensuing child-birth. Toward the close of the direct examination of the libelant we note the following questions and answers: "Q. Now, I want to ask you generally, Mrs. Bruns, as a result of all the different things you have testified to here in respect to your husband's treatment of

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you, what was the effect upon you during the entire married life as to whether or not your marriage was a happy or unhappy one. A. Unhappy one. Q. And how did it affect you physically, Mrs. Bruns? A. Why, I never weighed over 112 pounds. Q. You never weighed over 112 pounds? And is that less weight or more weight than previously? A. Less. Q. And how has it affected you mentally, Mrs. Bruns? What has been your state of mind during all this time? A. Very upset. Q. Very upset? And how did it affect you mentally in respect to your ability to do the ordinary things you were accustomed to do prior to your marriage? A. I couldn't do them. Q. Why couldn't you do them, Mrs. Bruns? A. I wasn't strong enough to do them. Q. You were not strong enough to do them? And was that condition the same or different after you got over the effects of the birth of your child? A. The same. Q. It was the same? And how was the effect prior to the time that you became pregnant? What was your ability, your mental ability to attend to doing things you were in the habit of doing? A. It was all right." And upon cross-examination the libelant gave the following testimony: "Q. Who is your physician, Mrs. Bruns? A. I have never had a doctor only when I was with the baby, Dr. Hodgins. Q. Never needed one? A. No, sir. Q. Pretty healthy? I say you are in pretty good health, are you? A. Well, up to the time the baby was born. Q. And from the time the baby was born you are a little thin? The baby has held you down? A. Yes, sir. Q. And outside of that there is nothing organically wrong with you? A. No, sir; I have some pains in my back and side. Q. That is from the delivery, is it? A. I really don't know; I guess so. Q. And other than the pains in your back and your side you are in fair physical and mental condition? A. Yes, sir."

We are unwilling to say that the circuit judge committed error in dismissing the libel. The statute (R. L. Sec. 2228) authorizes the granting of divorces for "extreme cruelty" with-

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out defining in what such cruelty may consist. In *Coleman v. Coleman*, 5 Haw. 260, which was a suit for separation on the ground of "excessive and habitual ill-treatment" this court approvingly quoted Lord Stowell that "What merely wounds the mental feelings is in few cases to be admitted where not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty." In *Bartlett v. Bartlett*, 13 Haw. 707, 708, a more liberal view was taken, the subject of extreme cruelty being summed up thus: "One particular course of conduct may be held to amount to extreme cruelty, and another not, and generalizations may be made to a certain extent as to what constitutes extreme cruelty, but from the very nature of the case no definition of extreme cruelty can be framed which can be satisfactorily or easily applied to all cases. The prevailing view seems to be that personal violence is not necessary, but that it is sufficient if the conduct is such as to impair the health or produce bodily injury or such as to create an apprehension of bodily injury. The usual test seems to be physical injury, but this may be actual or apprehended, and may be direct or indirect through mental suffering. Mental suffering is not generally deemed sufficient unless it is such as to impair the health, in other words, if mental suffering is sufficient, its test is generally that it impairs the health. In some states by statute extreme cruelty may consist of mental suffering alone, and perhaps in one or two states this has been held in the absence of statute. This may be a reasonable view but we need not in this case express our opinion as to what weight should be given it considering the preponderance of authority to the contrary." In *Kauhimahu v. Kauhimahu*, 19 Haw. 378, a suit for divorce on the ground of the extreme cruelty of the wife, it was said that "The wife's conduct in this case certainly ought to make the husband's home life unbearable but it will not do to grant

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divorces on the ground that the married pair are unendurable to each other. Causing mental agony is not, under our statute extreme cruelty. * * * The plaintiff testified that his wife's conduct worried him so that he did not sleep well and kept him from study and work, but that it did not affect his health. Whether the evidence would sustain a finding of adultery or not we cannot hold that it shows a case of extreme cruelty."

Within the principle of the two cases last referred to the libelant in the case at bar failed to make out a cause for divorce. The rights of the parties are governed by the statute, and, as pointed out, the statutory ground which the libelant has invoked has not been substantiated by the evidence.

The decree appealed from is affirmed.

E. C. Peters for libelant.

W. B. Lymer (*Thompson, Wilder, Watson & Lymer* on the brief) for libellee.

WILLIAM GEORGE WOND AND HENRIETTA WOND,
MINORS, BY GEORGE J. WOND, THEIR GUARD-
IAN AD LITEM, AND GEORGE J. WOND, v. ILI-
AHE MIKALEMI AND AKONE KAWAA.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED SEPTEMBER 9, 1912.

DECIDED SEPTEMBER 25, 1912.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

EQUITY—*answer as evidence.*

Where the answer to a bill inequity denies the facts charged in the bill only upon information and belief more testimony than that of one credible witness is not required to establish the allegations of the bill.

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DEEDS—when deed not to be deemed fraudulent.

Where a deed has been prepared by an attorney at the request of and in accordance with directions given him by the grantor and it has been executed by the grantor freely and voluntarily and delivered to the grantee without any misrepresentation having been made as to its contents, it will not be regarded as fraudulent because the grantor made statements both before and after its execution to others than the attorney which tended to indicate that she entertained an intention to make a disposition of the property different from that provided for in the deed, nor for the reason that the deed was not read by or to the grantor before its execution.

OPINION OF THE COURT BY ROBERTSON, C.J.

This is a suit to establish two lost and unrecorded deeds, and for other relief. The original suit was instituted by William Davis, Joseph Davis and Mary N. Lee Hoy, children of Joe Davis, late of Ewa, Oahu, deceased, against Pokii Davis, the step-mother of the complainants, and certain others as defendants. Before the case was called up for hearing Pokii Davis had died, and the complainants had sold and conveyed their respective interests in the land involved in the suit to George J. Wond, a son-in-law of said Joe Davis and one of the defendants. By appropriate proceedings had to that end, William George Wond and Henrietta Wond, minor children of a deceased daughter of said Joe Davis, by guardian ad litem, and George J. Wond, their father, became the complainants and Iliahe Mikalemi and Akone Kawaa, respectively the sister and brother of said Pokii Davis, and her heirs at law, became the defendants. The complainants discontinued as to certain others who had been made parties defendant by the original bill.

It was averred in the bill that on the 16th day of January, 1905, Pokii Davis, desiring to convey certain lands which she owned to her husband Joe Davis, duly executed, acknowledged and delivered a deed conveying said lands to one Kalualilili, her said husband joining in and consenting to the conveyance; that on the same day and as part of the transaction said Kalua-

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liilii, his wife releasing dower, executed, acknowledged and delivered a deed conveying said lands to Joe Davis but reserving to said Pokii Davis the rents, issues and profits of the lands for the period of her natural life; that the deeds which were not recorded remained in the possession of Joe Davis until his death on the 2nd day of April, 1909; that complainants made diligent but unsuccessful search for said deeds and that they are either lost or destroyed, or are being fraudulently concealed by one Eli M. Crabbe, the husband of a sister of the complainants, to whom, it was alleged, the said Pokii Davis had, after the death of her husband, conveyed, for a nominal consideration some of the lands referred to.

Pokii Davis, in her answer, alleged that for about eleven years she had been paralyzed to such an extent as to be deprived almost entirely, at times, of the use of her limbs, and that her speech was so impaired that she could not make herself understood except to those in close and long association with her, and that for some weeks next preceding the 16th day of January, 1905, she had been unusually ill and in expectation of immediate death; that with such expectation she had instructed her husband to have prepared for her execution such papers as would, in the event of her death, convey to her husband the lands mentioned in the bill and as would continue the title in her in the event that she should survive her husband or should recover from her then unusual illness; that, on said 16th day of January, she executed and acknowledged a certain document which her husband had caused to be prepared and which he submitted to her with the assurance that it was in accordance with her directions; that said document was in the English language, was not read or interpreted to her, and that she had no knowledge of its contents other than her belief that the same represented her expressed desire and intention; that she made no delivery of the document so executed to said Kalualiiilii or to any other person; that upon the same date and as a part of the same transaction Kalualiiilii and his wife executed and acknowl-

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edged a certain other document which was in the English language, the contents and legal effect of which she has ever been ignorant except that she was then and there given to understand by her husband that it was necessary to the carrying out of her purpose and intention that said document should be executed; that it was not her intent or desire to make a present conveyance of said lands either immediately or through the medium of said Kalualiilii to her said husband; and that if in fact and in law said deeds constituted such a conveyance they were deceitful and fraudulent in character and did not represent her wishes or intention in the premises.

It was stipulated at the hearing that the answer of Pokii Davis should be taken as and considered to be the answer of the defendants Ilihae Mikalemi and Akone Kawaa, they answering, however, upon information and belief instead of positively.

The first point presented for consideration is as to the effect to be given to the answer of Pokii Davis. Counsel for the appellants invokes the rule that in equity an answer which is under oath (a sworn answer not having been waived) and is responsive to the bill is evidence in favor of the party so answering and will entitle such party to prevail unless it is overborne by the evidence of two witnesses or of one such corroborated by circumstances. Assuming that the answer was responsive to the bill and that the case for the complainants, so far as the crucial question whether the deeds in question were drafted according to the instructions, and expressed the desire and intent of Pokii Davis, is concerned, depends upon the testimony of one witness, i. e. the attorney who prepared the documents, and that he was not corroborated as to that point, we are of the opinion that the rule does not apply. Pokii Davis was not a party to the suit when it was tried. The present defendants "in order to save mutual labor," as their counsel put it, obtained the consent of counsel for the complainants that the answer of Pokii Davis might be adopted by them as their answer except that they should be understood as making the averments upon informa-

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tion and belief. The answer of the present defendants, therefore, was an answer upon information and belief merely. Such an answer, though responsive to the bill, does not have the force and effect of a positive answer and is not within the rule sought to be invoked. 1 Beach Mod. Eq. Pr. Sec. 377; 16 Cyc. 388.

The remaining question is whether the complainants proved the allegations of their bill and are entitled, as the court below held them to be, to the relief sought. Mr. Frank Andrade, the attorney who prepared the deeds, testified clearly and positively to the effect that he prepared them at the request and according to the instructions of Pokii Davis by whom he was employed for the purpose in December 1904 and who told him that she desired to have the lands placed in the name of her husband, Joe Davis, but that she wished to have something to say about the lands while she was living; that with her and her husband he talked over the method by which the transfer could be accomplished; that he suggested a will, but she objected on the ground that a will might be attacked; that she said that the chances were that she would die before her husband and that she did not want her own people, her brother and sister, to have any interest in the land; that he informed her that the land would go to her husband's heirs in case of his death and she said it would be all right if she was protected through her life; that there was no suggestion of a joint tenancy; and that she named Kalualiilii as the one through whom the title should be passed to her husband. The witness testified that he had known Mrs. Davis for a number of years and was able to understand her speech; that upon obtaining the necessary data from which to draw the documents, he prepared two deeds, one a conveyance of the lands in question by Pokii Davis to Kalualiilii, and his heirs, in which Joe Davis was to join, and the other a conveyance of the same lands by Kalualiilii to Joe Davis, and his heirs, in which Kalualiilii's wife was to release her dower, the latter containing also a reservation of all the rents, issues and profits arising out of or from the lands to Pokii Davis for the term of her

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natural life; that a carbon copy of the first mentioned deed had been preserved by him and it was produced at the hearing. There is no dispute or conflict in the testimony as to the subsequent execution of the deeds and their delivery to Joe Davis. It appears that at the time of their execution they were not read over by or translated to the parties. The notary who took the acknowledgments testified that he asked the parties if they understood what they were signing and upon their saying that they did he took their acknowledgments. The testimony tends further to show that the deeds were kept in a trunk in the Davis home until some time after the death of Joe, but what eventually became of them does not appear.

It further appeared in evidence, however, that at a conference had after the deeds had been prepared but before their execution at which Mr. and Mrs. Davis, and Kalualiilii and his wife were present Mrs. Davis explained that her intention was to deed the land to Kalualiilii and that he was to deed it back "to Pokii and Joe" so that if she should die the lands would go to Joe but that if Joe should die first the lands would revert back to her. Eli Crabbe testified that after the death of Joe Davis he asked Pokii if she was going to have the deeds recorded and that she said no, there was plenty of time as the land still belonged to her. Another witness testified that about a year after the death of Joe Davis he was consulted by Pokii with reference to borrowing some money upon the security of these lands; that he reminded her of the conveyances to Kalualiilii and Joe Davis and told her that she did not own the property, whereupon she said that those papers were made to prevent her brother and sister from getting the property, that they had not been put on record and that for the purpose of raising money on the lands those deeds were either destroyed or could be destroyed; and that as Joe Davis had died the property was her own.

Upon the testimony, which we have briefly summarized, we cannot say that the defendants' claim that the deeds in question

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were fraudulent is sustained. Some of the testimony undoubtedly tends to support the contention that Pokii Davis intended that in the event of her husband's death during her lifetime the title should revert to her but according to the testimony of her attorney the deeds were drawn precisely in accordance with her instructions and with a view to effectuate her desire as she expressed it to him. The deeds were voluntarily executed, and there is no evidence that their contents were misrepresented by anyone. We hold that the complainants are entitled to the relief sought and that the decree appealed from ought to be affirmed.

Decree affirmed.

Frank Andrade for complainants.

C. W. Ashford for defendants.

CONCURRING OPINION OF PERRY, J.

Although some testimony was introduced to the effect that both before and after the execution of the deeds the grantor, Pokii Davis, stated to others than her attorney that the deeds were intended by her to convey the title to Joe Davis in the event of his surviving her and to leave the title in her if she should survive him, a purpose radically different from that expressed on the face of the documents, my finding, in reliance mainly upon the testimony of the attorney, is that the latter correctly understood the grantor's instructions to him, that the documents as prepared by him were such as to effectuate her intention and desire as expressed to him, that the deeds were executed and delivered freely and with a correct understanding of their effect and that at the time of their execution the grantor's intention and desire in the matter were still the same as expressed by her to her attorney when giving him the instructions referred to. For these reasons I concur in the affirmance of the decree appealed from.

In re Kim, 21 Haw. 295.

IN THE MATTER OF THE APPLICATION OF M. S.
KIM FOR A WRIT OF HABEAS CORPUS.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED SEPTEMBER 13, 1912.

DECIDED SEPTEMBER 25, 1912.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

CRIMINAL LAW—*plea of guilty—adjudication of guilt.*

Upon a plea of guilty an independent adjudication of guilt by the court is not necessary and the court may thereupon proceed to pass sentence.

CRIMINAL LAW—*cumulative sentences—power of magistrates.*

District magistrates have power in proper cases to impose cumulative sentences.

CRIMINAL LAW—*cumulative sentences—construction of record.*

A magistrate's record on pages 411 and 412, under date of April 28, 1911, contained entries in immediate succession of five separate charges against the same defendant and of a plea of guilty and a continuance in each case to the following day. On page 413 appeared entries in immediate succession of five separate sentences against the same defendant just referred to, each showing that the cause came by continuance from the preceding day. Held, that ordinary procedure and ordinary reading support the view that the cases were taken up for sentence in the order in which they were entered in the magistrate's record of April 28 and that in making the entries of April 29 the magistrate intended them to be read as referring to the cases in the order in which the charges were entered on April 28.

OPINION OF THE COURT BY PERRY, J.

(Robertson, C.J., Dissenting.)

This is a petition for a writ of habeas corpus. On April 28, 1911, five separate charges were entered in the district court of Honolulu charging the petitioner with obtaining money under false pretenses. The offenses were charged to have been committed on five separate days and against five persons and involve five distinct sums of money. The petitioner appeared

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in person and pleaded guilty to each charge. Each case upon the entry of the plea was continued until the following day for sentence. There is no objection now to the sufficiency of any of the charges as entered. In each instance all the essential elements of the offense appear to have been set forth. In volume 23 of the criminal records of the district magistrate on pages 411, 412, under date of April 28, 1911, the five charges were entered in succession, no record of any other case intervening. At the end of the entry of each charge appear the words "Defendant pleads guilty. Imposition of sentence by the court deferred until April 29, 1911." In the same volume on page 413, under date of April 29, 1911, the following entries appear:

- "M. S. Kim" "From April 28, 1911.
"Defendant was sentenced to be imprisoned for a term of Eight (8) Months, and to pay costs of Court, \$1.00."
- "M. S. Kim" "From April 28, 1911.
"Defendant was sentenced to be imprisoned for a term of Seven (7) Months, and to pay costs of court \$1.00. This sentence shall begin immediately after the expiration of the term of sentence in the preceding case."
- "M. S. Kim" "From April 28, 1911. Defendant in Person.
"Defendant was sentenced to be imprisoned for a term of Seven (7) Months, and to pay costs of court \$1.00. This sentence shall begin immediately after the expiration of the term of sentence defendant may then be serving."
- "M. S. Kim" "From April 28, 1911. Defendant in Person.
"Defendant was sentenced to be imprisoned for a term of Seven (7) Months, and to pay costs of court \$1.00. This sentence shall begin immediately after the expiration of the term of sentence he may then be serving."
- "M. S. Kim" "From April 28, 1911. Defendant in Person.
"Defendant was sentenced to be imprisoned for a term of Seven (7) Months, and to pay costs of court \$1.00. This sentence shall begin im-

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mediately after the expiration of the term of sentence he may then be serving."

No other entry relating to the judgment, sentence or other proceedings in the cases appears in the magistrate's record. On April 29, 1911, the date on which the sentences were imposed, five mittimuses were issued respectively bearing the numbers 9640, 9641, 9642, 9643, 9644, number 9640 being for the offense named in the charge first entered in the record for April 28 and the others corresponding in the order of their numbers with the order of the charges as entered on that day. Each mittimus recites in full the charge made under the particular case. Number 9640 simply recites a sentence of eight months imprisonment. Number 9641 contains the declaration "This sentence to take effect at the expiration of his former sentence of even date under Mittimus No. 9640." Each of the succeeding mittimuses similarly declares that the sentence thereby imposed is to take effect at the expiration of the former sentence, giving the number of the last preceding mittimus.

The grounds urged by the petitioner for his discharge from custody are the following: that the sentences are void because no judgments were rendered or entered; that the sentences are by their terms concurrent and not cumulative and that the one prescribing the longest period of imprisonment has expired; that the district magistrate had no authority to impose cumulative sentences; that the sentences are uncertain and that it is impossible to ascertain from the entries in the magistrate's docket in which case each one was imposed; that the mittimuses cannot be resorted to in aid of the defective record of the sentences; and that oral evidence was inadmissible to add to or explain the entries concerning the sentences.

The case, then, is that of a prisoner who has appeared in person in answer to five charges presented against him with all the essential formalities required by law and has confessed his guilt in each one of the five cases and upon whom by reason of the pleas of guilty have been imposed five sentences, each of them

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within the power of the magistrate to impose, and who now asks release from those sentences. There is no room for the contention, and none is made, that the petitioner is innocent or that any of the substantial requirements of a fair trial have been denied him or that any of the sentences was rendered in excess of the jurisdiction of the court, but merely that the magistrate was guilty of technical errors or omissions in entering the sentences in his docket. The contentions advanced are purely technical and not substantial. In the language of the supreme court of Missouri "it is not justice that the petitioner seeks but an escape from it." *Ex parte Kayser*, 47 Mo. 253, 255. We are unwilling to release him from custody unless the law imperatively requires it and we think that it does not.

It is well settled that upon a plea of guilty an independent adjudication of guilt by the court is not necessary. The defendant confessing the truth of the charge against him there is nothing left for the court to find and it may without further intervening steps proceed to sentence the accused. The plea of guilty operates as a conviction just as effectually as does the verdict of a jury or the judgment of the court in a jury-waived case. It may be that a strictly formal procedure would suggest a recital in connection with the imposition of sentence of the fact of the entry of the plea of guilty or other conviction, as the case may be, but this is not essential when it otherwise appears from the record that the accused was duly convicted; and particularly is this true of our district courts which are not courts of record and in which the procedure is and always has been more or less informal.

"We think that the objection is hypercritical. After a plea of guilty, there is nothing further for a court to do than to pronounce sentence. The plea of guilty is like the verdict of guilty. * * * There is no duty in the court to 'convict' but only to sentence. If the prisoner pleaded not guilty and if he were tried without a jury, then the court would find him guilty or not guilty; but when he pleads guilty, there is nothing for the

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court to find." *People v. McEwen*, 67 How. Pr. 105, 112. "If the plea" of nolo contendere "is accepted, it is not necessary or proper that the court should adjudge the party to be guilty, for that follows as a legal inference from the implied confession, but the court proceeds thereupon to pass the sentence of the law." *Com. v. Ingersoll*, 145 Mass. 381, 382. "If he pleads guilty upon his first arraignment and this plea is received by the court and recorded it is an admission of all facts well charged in the indictment or complaint and a waiver of his right of trial by jury thereon, and, unless withdrawn by special leave of court, * * * leaves nothing to be done but to pass sentence." *Com. v. Mahoney*, 115 Mass. 151, 152. See also Bishop Statutory Crimes, Sec. 348; *People v. Goldstein*, 32 Cal. 432, 433; *Com. v. Horton*, 9 Pick. 206, 207; *West v. Gammon*, 98 Fed. 426; 19 Pl. & Pr. 436, 437; 12 Cyc. 771.

The sentences were intended to be cumulative. The second one provides that "this sentence shall begin immediately after the expiration of the term of sentence in the preceding case" and the third, fourth and fifth each provides that "this sentence shall begin immediately after the expiration of the term of sentence defendant may then be serving." Language could not express the intent of the magistrate more clearly. Nor is there any uncertainty as to the time of the commencement or of the termination of each sentence. That is certain which can be made certain. The first sentence began immediately upon its imposition and each of the others immediately upon the expiration of the next preceding one. It has long been the unassailed practice in our courts, including the district courts, to impose cumulative sentences when the circumstances required that course and the practice was recognized in the case of *In re Tam Fook*, 7 Haw. 162, 166. By the weight of authority as well as of reason such sentences are sufficiently definite and within the power of a court to impose even in the absence of express statutory authority. "By the common law of England * * * the sentence, at least in misdemeanors, may direct the imprison-

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ment on one count or indictment to commence on the termination of that on another." Bishop New Criminal Procedure, Sec. 1327. "It is a familiar rule of the common law with respect to misdemeanors that the court may order the imprisonment on one count or indictment to begin on the expiration of that on another. * * * In some of our states it has been denied that the court has such a power in any case, unless given by statute. * * * But the great weight of authority is undoubtedly the other way. * * * And such power has uniformly been exercised in this state with respect to sentences in cases of felony as well as of misdemeanor." *Breton, Petitioner*, 93 Me. 39, 42. "It has long been well settled, in cases of this kind, where the prisoner has been convicted of several distinct offenses, that the court may give judgment upon each one of them, and, in doing so, may lawfully direct that the term of imprisonment for one shall commence at the expiration of that for another, and so on, until all the terms have expired." *Re McCormick*, 24 Wis. 492, 493. "If distinct offenses although of a similar character, are set forth in several counts in the same indictment, and, a fortiori, if set forth in different indictments or informations, it is in the power of the court to impose cumulative sentences, that is, periods of confinement, each one of which is independent of the other." *Re Fry*, 3 Mackey (D. C.) 135, 139. "To hold that where there are two convictions and judgments of imprisonment at the same term, both must commence immediately and be executed concurrently would clearly be to nullify one of them. * * * We think, both upon principle and the weight of authority, that we are required to hold that it is not error, upon a conviction in a criminal case, to make one term of imprisonment commence when another terminates. There is but little force in the objection that the term of commencement of the second term is contingent and uncertain. It is true that the first term may be ended by a pardon or a reversal of judgment, but its termination will be rendered certain by the event and then the second sentence by its terms takes effect." *Williams*

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v. State, 18 O. St. 47. See also *Ex Parte Ryan*, 10 Nev. 261; *Kite v. Com.* 11 Met. 581; *People v. Forbes*, 22 Cal. 136 and *In re Walsh*, 37 Neb. 454.

If resort may lawfully be had to the mittimuses there is no possibility of doubt concerning the identification of the offense for which each sentence was imposed or the order in which the sentences were to be served. Each mittimus contains a statement of the charge in full. Each is numbered and the later ones refer specifically by number to the earlier. But even assuming that resort may not thus be had to the mittimuses the same result is reached. The five charges are entered under date of April 28 immediately following each other in the magistrate's record. In each instance the plea and the fact of a continuance for sentence to April 29 was recorded immediately following the entry of the charge. Then on the next succeeding page are entered the five sentences immediately following each other and each preceded by the entry "from April 28, 1911" and with the words "M. S. Kim" in the margin opposite each sentence. Ordinary procedure and ordinary reading support the view that the cases were taken up for sentence in the order in which they were entered in the magistrate's record of April 28 and that in making the entries of April 29 the magistrate intended them to be read as referring to the cases in the order in which the charges were entered on April 28. This is the reading and the conclusion, we believe, required by common experience and common sense and we are unwilling to order the prisoner discharged on the ground of a technical possibility that the cases were taken up in an unusual order and that the entries on the 29th were made in a way calculated to mislead the reader. Courts owe a duty to the community at large as well as to persons accused of crime and in the effort to protect the latter against unjust or illegal punishment should not overlook the right of the public to protection from those who have confessed their guilt and who have been sentenced to lawful terms of imprisonment by a tribunal with jurisdiction to impose the sen-

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tence. "It may as well be understood that it is not the duty of the courts to discharge prisoners, fairly and legally convicted, from confinement, because of technical errors and defects in the record of sentence or in the commitments." *In re Parks*, 81 Mich. 240, 243.

It is unnecessary to decide whether oral evidence of the magistrate was admissible to further identify the offenses for which each sentence was imposed.

The order appealed from remanding the prisoner is affirmed.

R. P. Quarles for petitioner.

J. W. Cathcart, City and County Attorney, for respondents.

OPINION OF ROBERTSON, C.J., DISSENTING IN PART.

The record of the district magistrate shows that on April 28, 1911, the petitioner pleaded guilty to five separate charges of obtaining money under false pretenses, and that on April 29, 1911, the magistrate sentenced him to five separate and cumulative terms of imprisonment. The cases were not designated by number and the record fails to show in which of the cases any one of the sentences was imposed. Counsel for the petitioner contends that the uncertainty so resulting is such that there is no valid judgment under which the petitioner can legally be kept in custody. If this is so, it is a matter of substance and not a mere technicality.

The prosecuting attorney answers that the alleged uncertainty may be obviated in any one or all of three ways: (a) by resort to the mittimuses, which, it must be conceded, would remove all uncertainty if the resort to them may properly be had; (b) by resort to the testimony of the district magistrate who, over the objection of petitioner's counsel, testified to the effect that the cases were called up for sentence in the same order in which they were called up for arraignment and plea; and (c) that the inference to be drawn from what appears in the magistrate's record is that the cases were continued from one day to the next

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in the order in which the charges were entered, and the sentences were imposed upon the defendant in the same order. Without passing on the first two points the majority sustain the last mentioned contention. It is from this that I dissent. The argument is that ordinary procedure and ordinary reading support the view contended for, and that such reading and conclusion are required by common experience and common sense. Thus, the majority, by indulging a presumption which seems to me to be no more substantial than a mere conjecture, find that the magistrate's record shows a valid subsisting judgment and sentence, or, rather, five such, free from any uncertainty or indefiniteness. But as I look at it there is no more reason for presuming that on the second day the cases were called up in the same order in which they were called on the first day than there is for supposing that they were called up in the reverse or a different order. It is purely and simply a question of fact, for the event may have occurred as well one way as the other and there cannot be said to be any common observation, experience or other proper basis for a presumption one way or the other. Presumptions of fact which have been referred to as "the bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts" (196 Mo. 550, 571) may and should be indulged under proper circumstances and when they rest upon solid ground, but the indulging of a presumption whose basis is unstable is as apt to lead away from the truth as toward it.

The district courts are not courts of record, but the magistrates are required by statute to keep a record of their proceedings, transactions and judgments. Ordinarily the sentence or judgment entry should state the offense for the commission of which the defendant was sentenced, but it is enough that that can be ascertained from the record as a whole. In the case at bar, however, as it seems to me, the record is fatally defective, and valid sentences can be shown only by recourse to the mittimus or the testimony of the magistrate. Whether recourse

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can legally be had to either of those sources I need not stop to consider in view of the conclusion of the majority that the petitioner must be remanded. As to the other questions discussed in the opinion of the court I agree with what is there said.

LEIALOHA (k), LAHAPALIILII BUSH AND JOHN F.
COLBURN v. EDWARD H. F. WOLTERS.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

ARGUED SEPTEMBER 10, 1912.

DECIDED SEPTEMBER 26, 1912.

ROBERTSON, C. J., PERRY AND DE BOLT, JJ.

EJECTMENT—*prima facie* case.

In an action of ejectment the plaintiffs make out a *prima facie* case by evidence of adverse possession which shows that title to the land in controversy was acquired by one from whom the plaintiffs take title by right of inheritance through their adopting parent.

ADOPTION—*agreement for*—Act 83, L. 1905.

If an agreement of adoption, by which the adopting parent "covenants and undertakes to give" the adopted child the same rights in her estate after her decease as though the child were her natural child, is not sufficient of itself to confer the right of inheritance, the statute (Act 83, L. 1905), gives the agreement full force and effect in that regard by clothing the adopted child with the right of inheritance.

LIMITATION OF ACTIONS—*conflicting evidence—nonsuit.*

It is error to grant a motion for a nonsuit at the close of the plaintiffs' case, in an action of ejectment, even if there is some evidence tending to show that the defendant took possession of the land more than ten years before the plaintiffs began the action, there being also evidence tending to show the contrary. The court should not grant a motion for a nonsuit on conflicting evidence.

Leialoha (k) v. Walters, 21 Haw. 304.

OPINION OF THE COURT BY DE BOLT, J.

This is a writ of error to the circuit court of the first circuit to review a judgment of nonsuit entered in an action of ejectment brought by the plaintiffs in error (plaintiffs below) against the defendant in error (defendant below) to recover possession of a certain parcel of land fronting on Queen street in Honolulu, being a portion of apana 2 of the lands described in L. C. A. 30, R. P. 1809, to Kahoowaha; to which parcel of land the plaintiffs Leialoha and Lahapaliilii Bush claim title in fee simple by inheritance and to which the plaintiff Colburn claims right to possession by demise from the other two plaintiffs.

The parties were at issue to the court, trial by jury being waived, and upon the close of the plaintiffs' case the defendant moved for a nonsuit on the grounds, (1) that the plaintiffs had failed to prove title or right of possession to the land in controversy; (2) that the plaintiffs' evidence of title by adverse possession was so vague and uncertain that the court would not be able to give judgment in favor of the plaintiffs for the whole or for any definite part of the land; (3) and that it affirmatively appeared from the plaintiffs' evidence that the action was not commenced within ten years after the right to bring such action first accrued. The court granted the motion, expressly predicating its ruling upon the several grounds stated in the motion. Judgment of nonsuit was entered accordingly, whereupon the plaintiffs sued out this writ of error.

The assignments of error set out in the record are six in number, and include the three grounds stated in the motion for a nonsuit. In the view we take of the case, however, we deem it unnecessary to set out the other assignments of error referred to and will confine our attention to the grounds stated in the motion for a nonsuit and in the ruling thereon.

The plaintiffs offered in evidence probate record No. 1447, re estate of Kahoowaha, deceased, whereby, as they claim, it

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appears that Kahoowaha died in or about the year 1862, intestate, leaving no property or estate other than the lands mentioned; that on January 6, 1865, Umiumi, a brother, and Mauiawa, a nephew of Kahoowaha, deceased, were decreed to be his heirs at law; and that distribution of the estate of Kahoowaha was thereby made to them accordingly. The defendant objected to the admission of this record in evidence on the ground that the estate consisted entirely of land; that the probate court was without jurisdiction; and that, consequently, the proceedings had, including the decree therein, were void. The court sustained the defendant's objection and rejected the offer of proof. The plaintiffs now contend that even though the decree was void it should have been admitted in evidence for the purpose of showing color of title in Mauiawa, he having entered into possession under it as heir of Kahoowaha, deceased. They argue that the decree, though void, if it had been admitted in evidence it could have been relied upon by them as showing color of title in Mauiawa, and in the event of showing actual possession to only a part of the land by him, they could then have rightfully claimed that he had constructive possession of all the lands, including the land in controversy. Be this as it may, the probate record was in no way made a part of the record now before us for review, and, except as to the very meager showing made at the time it was offered in evidence, to which we have just alluded, we have no exact knowledge as to what the record actually contains. We cannot, therefore, undertake the consideration of the question raised by the refusal of the court to admit the record in evidence. However, upon a careful reading and consideration of the entire record now properly before us we are of the opinion that the plaintiffs made out a *prima facie* case (there being evidence tending to show actual possession of all the lands mentioned, including the land in controversy), and that the motion for a nonsuit should not have been granted on any of the grounds therein stated.

It appears from the record sent up that the plaintiffs adduced

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evidence tending to show that Umiumi on January 23, 1865, sold and conveyed all his interest, if any he had, in the lands described in the patent, to Mauiawa; that Mauiawa immediately thereafter entered upon and assumed sole and exclusive control and actual possession of all the lands mentioned, and from that time on until his death in 1896, a period of about forty years, he lived on the land, used and improved it as his own; that he had at least three houses on the land, one of which he used for himself and the others were occupied by tenants of his; that a portion of one of these houses stood on the land in controversy; that he had a fence along the Ewa side of the premises; that the mauka and Waikiki boundaries of the land were designated by fences owned by adjoining land owners; that he used that portion of the land now in dispute and which fronts on Queen street, for a roadway leading up to his house; that no part of the premises in dispute, except as to the claim of the defendant, was ever claimed by or in the adverse possession of any one during the possession thereof by Mauiawa; that he died intestate without children, leaving his wife, Lahapa, as his heir at law, whether his sole heir or not, the record is silent; that Lahapa had resided on these lands with her husband for many years prior to his death, and continued to reside thereon after his death until January 20, 1900, when all the buildings and other structures and improvements thereon were destroyed by fire; that Lahapa died in 1907, intestate, leaving as heirs at law, her adopted children, the plaintiffs Leialoha and Lahapaliilii Bush.

Upon the evidence thus presented the trial court could have found, (1) that Mauiawa acquired title to the land in controversy by adverse possession; (2) that upon the death of Mauiawa, his widow, Lahapa, acquired title therein to one-half, if not all, of the land by inheritance; (3) and that upon the death of Lahapa, her adopted children likewise acquired title to the same by inheritance.

The defendant questions the right of the adopted children of

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Lahapa to inherit her estate, the contention being that the agreement of adoption does not in express terms give them that right; and that Act 83, Laws of 1905, is not retrospective, and, therefore, it cannot be invoked in this instance to give force and effect to the agreement of adoption. We see no merit in this contention. The agreement of adoption was duly executed and acknowledged before a circuit judge and recorded according to law on October 6, 1896, whereby Lahapa "covenants and undertakes to give the said children the same rights in her estate after her decease as though the said children were her own son and daughter respectively, born in lawful wedlock."

Act 83, Laws of 1905, reads as follows: "An adopted child, whether adopted by decree or judgment of a judge or court, or by an agreement of adoption legalized by a judge or court, or by an agreement of adoption duly acknowledged and recorded according to law, shall inherit estate undisposed of by will from its adopting parents the same as if it were the natural child of such adopting parents, and shall not inherit estate from its natural parents; the adopting parents of such child shall inherit estate undisposed of by will from such child the same as if such adopting parents had been its natural parents, and the natural parents of such child and their relatives shall not inherit estate from it; and for all other purposes an adopted child and its adopting parents shall sustain towards each other the legal relation of parents and child and shall have all the rights and be subject to all the duties of that relation the same as if such child were the natural child of such parents, and all such duties and rights as between such child and its natural parents shall cease from the time of the adoption."

The language of this statute is plain and unambiguous. There is no room for any question or doubt as to the legislative intent. The obvious purpose of the legislature was, to clothe the adopted child, whether adopted before or after the enactment of the statute, with the same rights of inheritance that the natural child enjoys. As the right of inheritance does not vest until the death

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of the person from whom the right is derived, the statute, of course, applies only in cases where such death has occurred since the enactment of the statute. It appears that Lahapa, the adopting parent, died in 1907, two years subsequent to the date of the statute. The statute, therefore, applies in this case, and, if the agreement of adoption is not sufficient of itself to confer the right of inheritance, the statute gives it full force and effect in that regard by clothing the adopted children with the right of inheritance.

One ground of the motion for a nonsuit, expressly adopted by the court below, as we have already observed, was, that it affirmatively appeared from the plaintiffs' evidence that the action was not commenced within ten years after the right to bring such action first accrued. Even if there was some evidence tending to show that the defendant took possession of the land in dispute more than ten years before the plaintiffs began this action of ejectment, there was also evidence tending to show the contrary. The court should not have granted the motion for a nonsuit on conflicting evidence. If the cause had been submitted on its merits, then, of course, the court could have properly weighed and considered all the evidence before it.

The judgment of nonsuit is reversed and the cause is remanded for a new trial.

T. M. Harrison (*W. C. Achi* with him on the brief) for plaintiffs.

W. B. Lymer (*Thompson, Wilder, Watson & Lymer* on the brief) for defendant.

Carty v. Jarrett, 21 Haw. 310.

No. 69. JAMES CARTY v. WILLIAM P. JARRETT. Exceptions from Circuit Court, First Circuit. Petition for Rehearing. Filed September 26, 1912. Decided October 1, 1912. Robertson, C.J., Perry and De Bolt, JJ. Per curiam: The defendant asks for a rehearing upon the grounds that the court overlooked matters decisive of the case in deciding that there was evidence sufficient to justify the jury in finding that the horses belonged solely to McWayne; that the court was wrong in holding that where there is no conflict in the evidence the question whether an estoppel has been proven is one of law; that the court was wrong in holding that the facts submitted did not constitute an estoppel; and that the court failed to consider the evidence of copartnership by estoppel in connection with the evidence of copartnership by contract.

We find no merit in the points advanced by defendant's counsel. The question as to the actual ownership of the horses rested upon the testimony of McWayne. Hordorn was not called as a witness. McWayne was examined and cross-examined quite fully on the subject, and his testimony was clear. The claim that McWayne was estopped to deny that Hordorn was interested in the horses as a copartner presented nothing different in principle from the claim of an estoppel on McWayne's part to deny that Hordorn had a joint interest in the animals. As to the question of estoppel by representation: In practice it is commonly found that the question of estoppel *in pais* is one of mixed law and fact which must be left to the jury to decide under appropriate instructions. But where, as in the case at bar, the undisputed evidence is insufficient in law to support the claim there is nothing to submit to the jury. The court must dispose of the matter as in any case of insufficiency of proof.

The petition is denied without argument under Rule 5.

Thompson, Wilder, Watson & Lymer for plaintiff.

E. C. Peters for defendant.

Carey v. Hawaiian Lumber Mills, Ltd., 21 Haw. 311.

MAURICE R. CAREY *v.* HAWAIIAN LUMBER MILLS, LIMITED, A CORPORATION, AND I. YAMAMOTO, T. KOMATSU, T. MITO, Y. YAMAMOTO, T. KAJITA, N. TAKEI, M. MURAKAMI, K. TASHIRO, A. MURAWAKA, T. MITAMURA, AND K. NARITA.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED OCTOBER 8, 1912.

DECIDED OCTOBER 14, 1912.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ..

COURTS—*opinions—confession of judgment.*

The statutory requirement that in jury-waived cases the trial court's "decision shall be rendered in writing stating its reasons therefor" does not apply in a case in which the defendant confesses judgment for a specified sum and the plaintiff accepts the confession.

JUDGMENTS—*collateral attack—evidence dehors the record.*

The recital in a formal judgment regular and valid on its face that it was entered by the court cannot be contradicted in a collateral proceeding by evidence dehors the record.

OPINION OF THE COURT BY PERRY, J.

This is a creditor's bill in equity, the material averments of which are that on November 29, 1911, the complainant obtained in an action at law in the circuit court of the first circuit of the Territory a judgment, duly entered, in the sum of \$8711.87 against the respondent corporation, that execution was issued on the judgment and returned wholly unsatisfied, that the judgment remains in force and wholly unpaid, that the other respondents are stockholders in the corporation and are indebted to it in certain specified amounts for unpaid subscriptions to the capital stock and that the corporation has no property save the right to the unpaid subscriptions. The object of the bill is to reach the unpaid subscriptions, or as much as may be necessary, in satisfaction of the judgment.

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The trial court dismissed the bill, reciting in the decree appealed from that "the allegations in plaintiff's complaint are not sustained."

At the trial the complainant offered in evidence, *inter alia*, the original judgment in the action at law together with the declaration, the summons, the corporation's answer of general denial, its pleading, subsequently filed, whereby it confessed judgment in the sum of \$8711.87, the execution and the return of execution. The court refused to receive the judgment in evidence, saying: "The question is, then, is this a judgment? I am also of the opinion that in determining this question the court is not confined to the mere paper which may be designated by endorsement the judgment, or the terms used in the document itself, but must ascertain for itself whether or not this is a judgment, legal judgment. I am also of the opinion that, in the absence of statute authorizing the clerk to enter a judgment without the authority or power of the court, that the judgment is void upon its face. Consequently I decline to accept the judgment as an exhibit." The complainant also made specific offers to prove each of the other averments of the bill and the court announced its willingness to receive the evidence but in view, apparently, of the dismissal of the bill in consequence of the supposed absence of proof of the judgment the evidence on the other subjects was not introduced.

The contention now made in support of the decree is that the judgment at law was void because (a) no written decision was filed in the action and (b) a formal judgment entered by a clerk of the circuit court without prior rendition of judgment or without, in other words, an express order of the court is utterly void.

Section 1747 of the Revised Laws, as amended by Act 117 of the Laws of 1909, requiring that in jury-waived cases the trial court's "decision shall be rendered in writing stating its reasons therefor" does not apply in a case in which the defendant confesses judgment for a specified sum and the plaintiff ac-

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cepts the confession. In such a case no question, either of law or of fact, remains to be decided by the court. There is no controversy requiring adjudication.

The attack made in the present suit in equity upon the judgment at law is clearly collateral and not direct. It is an attempt to avoid the judgment or to deny its force and effect in a manner not provided by law and in a proceeding not instituted for the express purpose of annulling, correcting or modifying it. See Van Fleet, Collateral Attack, pp. 4 and 5, and 17 Am. & Eng. Ency. Law 848. The judgment is upon its face regular and valid. It discloses that it was entered in a court that had jurisdiction of the subject matter and of the parties and is signed "By the court, J. Marcallino, Clerk." If, as is claimed by counsel but is not shown by the record on appeal, evidence dehors the record was resorted to in the court below to show that the judgment was in fact entered by the clerk without an order from the court, such evidence was an attempt to contradict the express recital on the face of the judgment that it was entered "by the court" and was inadmissible. The general rule is that "the record of the court imports such absolute verity that no person is allowed to contradict it in a collateral proceeding." 17 Am. & Eng. Ency. Law 1082. "All the cases agree that a record of a domestic court of general jurisdiction cannot be overturned in another action by matters dehors the record." Van Fleet, Collateral Attack, p. 7. See also *Ib.*, pp. 5, 536, 572; *Reid v. Mitchell*, 93 Ind. 469; *Harris v. Lester*, 80 Ill. 307, 314, 315; *State v. Macdonald*, 24 Minn. 48, 59; *Tufts v. Hancox*, 171 Mass. 148, 149; *Underwood v. French*, 6 Or. 67, 71; *Spaulding v. Chamberlain*, 12 Vt. 538; and 24 Am. & Eng. Ency. Law 193, 194. It may be added that no other part of the record in the action at law contradicts or varies the statement in the judgment that the latter was "by the court."

The decree appealed from is set aside and the cause remanded to the circuit judge with instructions to receive the judgment in evidence and for such further proceedings as may be proper.

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A. A. Wilder (*Thompson, Wilder, Watson & Lymer* on the brief) for complainant.

E. C. Peters for certain respondents.

CECIL BROWN, TRUSTEE UNDER THE WILL OF KALEIPUA KANOA, DECEASED, *v.* MARSTON CAMPBELL, SUPERINTENDENT OF PUBLIC WORKS, J. H. FISHER, AUDITOR, AND THE LORD-YOUNG ENGINEERING COMPANY, LIMITED, A CORPORATION.

RESERVED QUESTION FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED OCTOBER 2, 1912.

DECIDED OCTOBER 16, 1912.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

CONSTITUTIONAL LAW—*Fifth Amendment—taking private property for public use without just compensation.*

Chapter 83 of the Revised Laws, as amended, relating to the improvement of lands which are in an insanitary or dangerous condition, or deleterious to the public health, is a health measure enacted in pursuance of the police power, and in providing that the work of improvement shall be done by and at the cost of the owner of the land, or, in case he refuses to act, by the government at the land owner's expense, and authorizing the sale of the land to satisfy the lien imposed thereon for the amount of the cost of the improvement and the expense of foreclosure and sale, does not constitute or provide for the taking of private property for public use without just compensation in violation of the Fifth Amendment of the Constitution.

SAME—*Seventh Amendment—right of trial by jury.*

In the proceeding provided for by said chapter the land owner is not entitled, under the Seventh Amendment of the Constitution, to a trial before a jury on the question whether his land is in an insanitary or dangerous condition or deleterious to the public health.

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SAME—due process of law—notice and hearing.

The provisions of said chapter, requiring the giving of notice to the land owner of the decision of the board of health as to the condition of the land and of the nature and extent of the improvement required, and allowing an appeal from such decision to a board appointed by the circuit court, whose decision shall be final, with the opportunity to the land owner to be heard before such board of appeal, held to constitute due process of law, notwithstanding such board is not empowered to compel the attendance of witnesses or to administer oaths to witnesses.

SAME—delegation of taxing power.

The provisions of said chapter held not to constitute a delegation to an administrative board of the power of taxation.

OPINION OF THE COURT BY ROBERTSON, C.J.

This is a suit for an injunction to restrain the prosecution of certain work of improvement sought to be undertaken and carried out under and pursuant to the provisions of chapter 83 of the Revised Laws as amended by Acts 29, 112 and 157 of the Session Laws of 1911. The bill avers, in substance, that the plaintiff is a citizen and taxpayer of the Territory, residing in the city and county of Honolulu; that he is the duly appointed, qualified and acting trustee under the will of Kaleipua Kanoa, deceased, and is the owner of a certain described parcel of land situate on the southeast side of Kanoa lane, in Honolulu, containing an area of 3500 square feet; that the superintendent of public works on March 11, 1911, served the plaintiff with the following notice:

“Honorable Cecil Brown,
Trustee and Agent, Estate of Kaleipua Kanoa,
Honolulu.

I am in receipt of the following communication from the Board of Health of the Territory of Hawaii.

Honolulu, T. H., March 11th, 1911.

Honorable Marston Campbell,
Superintendent of Public Works,
Honolulu.

Sir:—

It is the opinion of the Board of Health and was so resolved by the Board at a meeting thereof held on Monday the

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6th day of March, 1911; that the following described piece or parcel of land, to wit:

That piece or parcel of land situate on the Southeast corner of Kanoa Lane, makai of King Street, City and County of Honolulu, Territory of Hawaii, described as follows:

Beginning at a stake on the North corner of this lot, on the Southeast side of Kanoa Lane, said point being located by the following traverse from Government Survey Street Monument near the East corner of King and Alapai Streets, said monument is on a 12 foot offset to the Southeast line of Alapai Street and on a 10 foot offset to the Northeast line of King Street, and the co-ordinates of said monument referred to Government Survey Δ 'Punchbowl' are, 3166.7 feet South and 1742.6 feet West.

(a) $299^{\circ} 29' 30''$ 306.5 feet.

(b) $40^{\circ} 53' 00''$ 298.7 feet to the initial point of this lot and running by true azimuths:

1. $310^{\circ} 12' 35$ feet along Kaleipua Est. to stake
2. $40^{\circ} 12'$ 100 feet along same to stake.
3. $130^{\circ} 12'$ 35 feet along same to stake.
4. $220^{\circ} 12'$ 100 feet along same to the point of beginning.

Being a portion of L. C. A. 569 to Puniwai, and containing an area of 3500 square feet.

is deleterious to the public health in consequence of being low and below the established grades of the streets nearest thereto and at times covered or partly covered by water and improperly drained and incapable by reasonable expenditure of effectual drainage, and that said land is in an insanitary and dangerous condition.

The operation deemed advisable by the Board and hereby recommended by it and so resolved by it at said meeting to improve said land, is as follows: that said land be put in a sanitary and safe condition by improving the same in such manner as will effect such purpose, and more particularly that the same be filled in to such grade as will be necessary for that purpose, and that in the opinion of this Board such filling in should be to the following grade to wit: to such grade that the surface of said piece of land when so filled in will be, as near as may be, in the same plane with the established grades of the streets nearest to said piece of land.

You are therefore requested to take the necessary steps pro-

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vided by law and more particularly by Chapter 83 of the Revised Laws of Hawaii as amended by Acts 29, 112 and 157 of the Session Laws of 1911, to cause said land to be so improved.

Respectfully yours,
Board of Health of the Territory of Hawaii.
By (Sgd) J. S. B. PRATT,
President.'

In pursuance of the above recommendation of the Board of Health, you are hereby notified to begin, within twenty days from your receipt hereof, to put said piece or parcel of land in sanitary and safe condition by improving the same in such manner as will effect such purpose, to wit: to such grade that the surface of said piece of land when so filled in will be, as near as may be, in the same plane with the established grades of the streets nearest to said piece of land.

You are further notified that in case you fail to begin work as aforesaid on the improvement of said piece of land within twenty days, and to complete such work within 60 days from your receipt of this notice, such work or so much thereof as may remain undone will be done by the Territory at the cost of the land benefited thereby.

(Sgd) MARSTON CAMPBELL,
Superintendent of Public Works of the Territory of Hawaii." Also, it is averred, that the superintendent of public works, after having advertised for and received tenders for filling certain lands in Honolulu, including plaintiff's land, entered into a contract with the Lord-Young Engineering Company, Limited, the lowest bidder therefor, for the performance of the work; that the auditor of the Territory approved said contract; that the contractor is about to commence work under the contract; that the superintendent of public works intends to pay out large sums of money and to approve vouchers under said contract as the work progresses; and that the auditor intends to issue warrants upon the treasurer of the Territory to said contractor in payment of the obligations so approved by the superintendent of public works. The bill further avers that the

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plaintiff is advised that chapter 83 of the Revised Laws, as amended, is unconstitutional and invalid in that it deprives the plaintiff of his property without due process of law; that it allows private property to be taken for public use without just compensation; that under it the plaintiff is denied a trial by jury; that it is contrary to the Fifth, Seventh and Fourteenth Amendments of the Constitution, and is in violation of section 55 of the Organic Act of Hawaii. The defendants, the superintendent of public works and the auditor, demurred to the bill, and the circuit judge reserved to this court the question whether the demurrer should be sustained.

The bill seems to have been drafted upon the theory that plaintiff's objections to the prosecution of the work under the contract were those merely of a taxpayer. But the argument in this court has proceeded on the supposition that the plaintiff is threatened with injury to his rights as the owner of specific property.

The statute provides that whenever in the opinion of the board of health any tract or parcel of land shall be deleterious to the public health in consequence of being low, and at times covered or partly covered by water, or of being improperly drained or incapable of effectual drainage, or for other reason in an insanitary or dangerous condition, it shall be the duty of the board to report such fact to the superintendent of public works, together with a brief recommendation of the operation deemed advisable to improve such land; that thereupon the superintendent of public works shall serve a copy of such notice upon the owner or occupant of the land and notify him that in case he fails to begin the work of improvement within twenty days and to complete the same within such reasonable time as may be designated, the work or so much thereof as may remain undone will be done by the Territory at the cost of the lands benefited thereby; that within such period of twenty days the owner or occupant so notified may file an appeal from the decision of the board of health condemning the land as deleterious

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to the public health or from its decision as to the nature and extent of the improvement to be made with the superintendent of public works who shall transmit the appeal to the circuit court of the circuit wherein the land is situated; that the court shall thereupon appoint three disinterested persons who shall sit as a board to hear and determine whether or not the land is deleterious to the public health and whether improvements of the nature designated in such notice are required, and if such improvements are not required, what, if any, improvements are required in order to render such land sanitary; that the decision of a majority of the board as to the necessity and nature and extent of the improvements shall be final and conclusive upon all parties in interest; that the board shall appoint a time and place for hearing and give notice thereof to the board of health, the superintendent of public works and the owner or occupant of the land; that the superintendent of public works shall furnish the appeal board with a plan of the lands to be improved, also a statement showing the extent and nature of the contemplated improvements, and an estimate of the cost thereof; that in case no appeal shall have been taken from the decision of the board of health, and the land owner fails to make the improvement as directed, or in the event of an appeal having been taken and the land owner fails to make the improvement in accordance with the decision of the appeal board, the superintendent of public works may proceed to make or complete the improvement accordingly; that the cost of the improvement made or completed by the superintendent of public works shall constitute a lien upon the land, notice of which shall be recorded in the office of the registrar of conveyances and a copy of the notice shall be served on the land owner; that such lien may be foreclosed at any time after six months and within two years by suit in equity or by public sale after certain prescribed notice without suit; that the land shall be offered for sale at public auction at an upset price equal to the amount of the lien plus the cost of advertising and other costs incurred, and if no higher

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price is bid shall be knocked down to the Territory which in such case shall be deemed to be the purchaser at the upset price; that the balance of the purchase price after deducting the amount of such lien and costs, or in case there is no balance or an insufficient balance an amount equal to the value of the land as last previously assessed for taxation shall be paid to the land owner; and that in case the Territory shall be the purchaser the amount of such assessed value shall be paid out of a certain fund.

The claim of the plaintiff that the statute, if enforced, would constitute a taking of his property for public use without making just compensation therefor, leads to a consideration, first, of the general nature and purpose of the statute, and, next, of some of its provisions. The contention is made that the statute is wholly void because it provides for the assessment of the whole cost of the making of the improvement upon the land upon which the work is done, whereas, it is argued, the legislature, in providing for such schemes of reclamation under a statute such as that under review, cannot constitutionally authorize an assessment against a particular parcel of land in excess of the value of the special benefit accruing to that land, or its owner, by reason of the improvement made or contemplated. The force of such a contention will depend upon the character of the statute at which the argument may be directed. For example, the opening, grading, and paving of public highways is essentially a function of government. The duty to grade or pave such a highway may not be imposed by law upon abutting owners, and although such owners may legally be compelled to contribute to the cost of grading and paving the highway upon which their lands are situated, the amount of the enforced contribution, laid in the form of a special tax or assessment, cannot legally exceed the value of the special benefits which accrue to the abutting property as the result of the improvement. The foundation of the power to tax specially in such cases is the benefit the object of the tax confers on the owners of the abut-

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ting lots. The value of that benefit will mark the limit of the assessment. *Norwood v. Baker*, 172 U. S. 269; *Martin v. District of Columbia*, 205 U. S. 135; *Wistar v. Philadelphia*, 80 Pa. St. 505; *White v. Gove*, 183 Mass. 333; *Agens v. Mayor of Newark*, 37 N. J. L. 415. But the statute in question does not involve the theory of special benefits accruing from a public improvement. This statute is a health measure as is sufficiently shown by the language of its first section. (R. L. Sec. 1025.) Proceedings under it commence with a finding by the board of health that certain land is deleterious to the public health or in an insanitary and dangerous condition. Land in an insanitary condition or otherwise deleterious to the public health through natural causes not contributed to by man was not a nuisance at common law. 29 Cyc. 1156; Wood's Law of Nuisances, (2 ed.) Sec. 116. Such a condition cannot be treated as a nuisance except by authority of statute. But there should be no doubt as to the authority of the legislature, in the interest of the public health and in the exercise of the police power, to impose upon the owner of land which has become or threatens to become a menace to health, through natural causes or by human agency, the duty of putting it in proper condition by the making of improvements which will render it sanitary. The statute in question does not expressly declare such to be the duty of owners of land of the character of that described, but the inference is unavoidable that it was enacted on the theory that the owner of such property owes a duty to the public which he may be required to perform, and that in case he has failed or refused to perform that duty a governmental agency may be authorized to do the work of improvement for him and at his expense. We believe it to be well established that the legislature may impose or assume a duty on the part of property owners to do certain things with reference to their property for the protection of the public irrespective of whether the performance of such duty will financially benefit the owner, and provide that in case he fails to do the necessary thing, the public,

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through governmental instrumentality, may do what is necessary and assess the property upon which the work is done with the entire cost thereof without reference to the matter of benefits. This would not be the exercise of the power of eminent domain, for it would not constitute a taking of private property for public use. Neither would it be the exercise of the power of taxation, for the work required to be done would not properly be regarded as a public improvement even though it would result in a benefit to the public. It would be the police power—the power to conserve the health and safety of the community that would be called into action. *Railroad v. Nebraska*, 170 U. S. 57; *Northern Pacific Railway v. Duluth*, 208 U. S. 583; *State v. Blake*, 36 N. J. L. 442, 447; *Van Wagoner v. Paterson*, 67 N. J. L. 455; *Keese v. Denver*, 10 Colo. 112, 123; *Meanor v. Goldsmith*, 216 Pa. St. 489; *Com. v. Roberts*, 155 Mass. 281; *Village of St. Marys v. Railroad Co.*, 60 Oh. St. 136; *Lisbon Ave. L. Co. v. Lake*, 134 Wis. 470, 475.

“If there is any fact which may be supposed to be known by everybody, and, therefore, by courts, it is that swamps and stagnant waters are the cause of malarial and malignant fevers, and that the police power is never more legitimately exercised than in removing such nuisances.” *Leovy v. United States*, 177 U. S. 621, 636. The filling of low land upon which water collects and becomes stagnant so as to menace the health of the neighborhood falls within the principle referred to, and the duty to improve conditions may be enjoined upon the owner, and, if he fails to take action after proper notice, the municipality or other agency may be authorized to make such improvement as the circumstances may require and to assess the cost against the land. *Hagar v. Reclamation District*, 111 U. S. 701; *Hagar v. Supervisors of Yolo*, 47 Cal. 222; *Horbach v. Omaha*, 54 Neb. 83; *Bancroft v. Cambridge*, 126 Mass. 438; *Nickerson v. Boston*, 131 Mass. 306; *Oliver v. Monona Co.* 117 Ia. 43; *Bliss v. Kraus*, 16 Oh. St. 54; *Sessions v. Crunkilton*, 20 Oh. St. 349.

We do not mean to say that swamp lands held in private own-

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ership may not be reclaimed through the exercise of the power of taxation at the expense partly of the owners and partly at that of the public where the scheme constitutes a general public improvement and is not a mere matter of compelling land owners to abate nuisances or remedy insanitary conditions. In such cases, as in the matter of grading and paving streets, the limit of the assessment which may be imposed against the lands immediately benefited is the value of the special benefit conferred. The case of *Tidewater Company v. Coster*, 18 N. J. E. 518, upon which counsel for the plaintiff seem to place much reliance, was one involving the making of a public improvement. Many cases of the same class might be cited.

We hold that the constitutional inhibition against the taking of private property for public use without just compensation is not violated by the provision of this statute authorizing the assessment of the whole cost of the improvement against the land improved.

It is contended that as the land owner may be compelled to submit to the sale of his land and to accept in lieu of his land an amount of money equal to its assessed value, which may be less than its actual value, constitutes a taking of his property without just compensation. The answer is that the lawful exercise of the police power may incidentally result in the taking or destroying of private property without any compensation being made to the owner. *Mugler v. Kansas*, 123 U. S. 623, 669; *Lawton v. Steele*, 152 U. S. 133. It was competent for the legislature to provide that the cost of making the improvement should constitute a lien on the land and that the lien should be satisfied by a sale of the premises. This naturally follows from the rule that when the land owner refuses to do the work the government may do it at his expense. It would be idle to give a lien and not permit its enforcement. The most that the owner could legally demand would be the balance of the proceeds of sale over and above the amount of the lien and the expense of foreclosure and sale. It may be noted that the

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statute provides that in any event the land owner shall receive an amount not less than that of the assessed value of the land, so that in some cases it may happen that the Territory would not be able to recoup the full cost of the improvement. In this respect the statute is more liberal than is necessary.

Further, it is argued that the provision which requires the owner of the land to make the improvement in the manner directed is not due process of law in view of the consequences of a refusal on his part to comply with the direction. The argument is that, viewing the condition of the property as constituting a nuisance, the owner is entitled to abate it in such manner as he may deem fit so long as he does it effectually. Several cases have been cited in support of the contention but it is not altogether clear that they apply to the circumstances involved here. The statute provides that the board of health shall make "a brief recommendation of the operation deemed advisable to improve such land," and that that recommendation is to be carried into effect by the superintendent of public works in case the land owner, after notice, fails to take action. The plaintiff was notified to fill in his lot to a certain grade, but the manner in which he should do the filling was left to his own discretion. Whether or not the notice went too far we think it is not necessary to decide in view of the fact that it is not alleged that the plaintiff appealed from the decision of the board of health, or that he offered or is willing to put his land in sanitary condition in his own way. There are cases which hold that where one is notified to abate a nuisance in a certain way he is not bound to pursue the exact method prescribed but may adopt any proper means to abate it. *Belmont v. N. E. Brick Co.* 190 Mass. 442; *Morford v. Bd. of Health*, 61 N. J. L. 386. But where the party notified pays no attention to the notice and takes no steps whatever to abate the nuisance he is not in a position to claim that he is absolved from taking any action because the notice served upon him was too precise.

The plaintiff does not claim that his land is not in the con-

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dition described in the finding of the board of health. He maintains, however, that he is entitled to a trial by jury on the question whether his land constitutes a nuisance or is, in fact, in a condition rendering it deleterious to the public health, and that as the statute does not give him the right to such a trial it is contrary to the Seventh Amendment of the Constitution. That Amendment preserves the right of trial by jury in suits at common law, but it does not apply to a special proceeding such as that provided for by the statute in question. The fact that courts of equity have jurisdiction to restrain by means of injunction the maintenance of nuisances shows that a party is not always entitled to a trial by jury on the question whether he is maintaining a nuisance. 24 Cyc. 122; *Mugler v. Kansas*, 123 U. S. 623, 673.

We think there is no merit in the contention that the provisions which entitle the land owner to notice and a right to be heard before an impartial board on appeal from the decision of the board of health, without allowing compulsory process to obtain witnesses, or empowering the board to administer oaths to witnesses, and making the decision of the board final, are lacking in due process of law. Many decisions of the supreme court of the United States may be cited to show that while due process of law implies notice and an opportunity to be heard it does not necessarily imply proceedings in court. *Public Clearing House v. Coyne*, 194 U. S. 497, 508; *Hibben v. Smith*, 191 U. S. 310, 322; *Murray's Lessee v. Hoboken L. & I. Co.* 18 How. 272. Referring to the case last cited, the court, in the case of *Davidson v. New Orleans*, 96 U. S. 97, 102, said, "A most exhaustive judicial inquiry into the meaning of the words 'due process of law' as found in the Fifth Amendment, resulted in the unanimous decision of this court, that they do not necessarily imply a regular proceeding in a court of justice, or after the manner of such courts." Speaking of this constitutional requirement, the supreme court, in the recent case of *Ballard v. Hunter*, 204 U. S. 241, 255, said, "A precise definition has never been attempt-

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ed. It does not always mean proceedings in court. Its fundamental requirement is an opportunity for a hearing and defense, but no fixed procedure is demanded. The process or proceedings may be adapted to the nature of the case."

We have found no case which would lead us to conclude that in a proceeding before an administrative board acting in a judicial or quasi-judicial capacity due process of law requires that the board should have authority to compel the attendance of witnesses or that it should hear only sworn testimony. Such a board could, and doubtless would, act at least to some extent upon its own knowledge and observation. In the proceeding contemplated by this statute it would be entirely proper for the board of appeal, besides considering such matters as the parties before it might present, to examine, in a more or less informal manner, into all the circumstances and conditions bearing upon the matter in hand with a view of arriving at an intelligent and just conclusion. We think such a procedure would be, in the language of the supreme court, "adapted to the nature of the case."

The remaining contention is that the statute violates section 55 of the Organic Act in that it attempts to delegate the power of taxation to an executive board. This point is disposed of by the view we have taken as to the general nature and purpose of the statute and the holding that it was not enacted in pursuance of the taxing power.

Finding, as we do, that the statute is not open to any of the objections raised by the plaintiff, we advise the circuit judge that the demurrer should be sustained.

A. A. Wilder and I. M. Stainback (*Thompson, Wilder, Watson & Lymer and Holmes, Stanley & Olson* on the briefs) for plaintiff.

A. G. Smith, Deputy Attorney General (*A. Lindsay, Jr., Attorney General*, with him on the brief), for defendants.

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CECIL BROWN, TRUSTEE, v. ROBERT WYLLIE
DAVIS.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED OCTOBER 7, 1912.

DECIDED OCTOBER 16, 1912.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

PARTITION—*disputed title—jurisdiction.*

In a suit for partition where the answer of the respondent, made under oath, is responsive to the bill and denies the cotenancy of the parties to the suit and the complainant's legal title to as well as his possession of the premises, and sets up legal title to the premises and exclusive possession thereof in the respondent, a court of equity will decline jurisdiction to try this question of disputed title; but will retain the bill for a reasonable time, until the issue of title has been determined in an action at law.

OPINION OF THE COURT BY DE BOLT, J.

The complainant, Cecil Brown, trustee, filed his bill in equity seeking to have certain alleged leasehold interests in those lands and premises known as Mokapu, situate in the city and county of Honolulu, partitioned between himself and the respondent, Robert Wyllie Davis. The bill alleges, in substance, that each of the parties (the complainant and the respondent) is the legal owner of an undivided one-half interest in the alleged leasehold thus sought to be partitioned and that they are in possession of the leasehold premises as cotenants.

The answer of the respondent, which was made under oath, (a sworn answer not having been waived), is responsive to the bill. It denies the cotenancy of the parties and any title to the said lands and premises in and possession thereof by the complainant, and alleges that the respondent on August 16, 1892, by virtue of a certain trust deed, "became and was possessed of a life estate in and to the said lands and premises known as Mokapu, freed and discharged from any and all trusts," and "that pursuant to said deed * * * the respondent on said last named day

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went into possession of said premises to reside thereon and use the same for grazing and agricultural purposes and ever since has been in possession thereof and residing thereon and using the same for grazing and agricultural purposes."

The cause having come before the circuit judge on a motion by the complainant to set the same for trial, the motion, in the language of the circuit judge, was "denied until such time as the complainant shall have determined his title at law." The complainant appeals from the order denying the motion to set the cause for trial.

The answer of the respondent, as already observed, not only denies the cotenancy and the complainant's title in as well as his possession of the premises, but it also sets up title and exclusive possession of the premises in the respondent, giving the respective dates, record and character of the muniments of title upon which he bases his claim. The claims of the respective parties as presented by their pleadings are, obviously, in conflict and the legal title to the premises is in dispute and doubtful.

"There can be no partition where there is no cotenancy" (30 Cyc. 215), and "equity will not exercise jurisdiction where the legal title is doubtful." *Id.* 243.

A suit for partition is instituted and can only proceed when the property is held in cotenancy and the respective shares of the cotenants are mutually conceded and are free from dispute and doubt. The sole object of the suit is to effect a division of the property between the cotenants so that each may hold his respective share in severalty.

In a suit for partition, "Where the complainant's legal title is disputed, courts of equity decline the jurisdiction to try this question; but, in analogy to the case of dower, they will retain the bill for a reasonable time, until the issue of title has been determined at law." 4 Pom. Eq. Jur. (3ed.), §1388. "A bill for partition cannot be made the means of trying a disputed title." *Clark v. Roller*, 199 U. S. 541, 545. "It is one of the

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well established rules governing suits in equity for partition that the parties will not be allowed in equity to try questions of title, and therefore, where the land is held adversely to the complainant, he cannot maintain a suit for partition without first establishing his title to the property in an action at law." 15 Ency. Pl. & Pr. 777. "The title of tenants in common must be conceded and at rest between them, or the court has no jurisdiction to partition the estate." *Wailehua v. Lio*, 5 Haw. 519.

Counsel for the complainant contends that the circuit judge should have referred the cause for proof of claims and have examined the various instruments and muniments of title, so as to have been in a position to judge whether or not there was a *bona fide* dispute as to title; and that the judge should not have rendered his decision on the motion to set the case for trial merely upon an examination of the pleadings. In our view of the case the pleadings show a *bona fide* dispute as to title.

It will be observed that the answer of the respondent, which was made under oath, is not a mere denial of the complainant's title, but it also sets out in circumstantial detail the facts, including the dates, record and character of the muniments of title, upon which the respondent bases his claim of ownership and right to the exclusive possession of the premises. In the absence of any showing to the contrary we must assume that the answer was filed in good faith and upon the *bona fide* belief of the respondent that the facts therein stated were true. With the pleadings in this case now before us, it is impossible to escape the conclusion that the legal title to the premises is in dispute. The question thus presented does not fall within the province of equity for determination, but is one for consideration in an action at law. This view is sustained by the authorities. *Kaneohe Rice Mill Co. v. Holi*, 20 Haw. 609, 610; *Welch's Appeal*, 126 Pa. St. 297; *Tobin v. Tobin*, 45 Wis. 298; *Keil v. West*, 21 Fla. 508; *Hay v. Estell*, 18 N. J. Eq. 251; *Lucas v. King*, 10 N. J. Eq. 277; *Overton v. Woolfolk*, 6 Dana (Ky.) 371; *Smith v. Butler*, 15 Appeal Cases, D. C. 345;

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Brown v. Cranberry Iron & Coal Co., 72 Fed. 96; *McClaskey v. Barr*, 42 Fed. 609; *Jenkins v. Van Schaack*, 3 Paige (N. Y.) 242; *Criscoe v. Hambrick*, 47 Ark. 235; *Trapnall v. Hill*, 31 Ark. 345; *Fales v. Fales*, 148 Mass. 42; *Pierce v. Rollins*, 83 Me. 172; *Hoffman v. Beard*, 22 Mich. 59; *Slockbower v. Kanouse*, 50 N. J. Eq. 481; *Bispham's Equity*, 535.

As to what would have been the proper procedure if the answer of the respondent had contained only a bare denial of the complainant's title, we express no opinion.

The circuit judge was right in denying the motion to set the cause for trial until the complainant shall have determined his title at law; provided, however, that action to that end shall be taken within a reasonable time.

The order appealed from is affirmed.

A. A. Wilder (Thompson, Wilder, Watson & Lymer on the brief) for complainant.

E. C. Peters for respondent.

MARIA DE SOUZA AND HILDA SERPA *v.* MANUEL
SOARES AND VIRGINIA SOARES.

APPEAL FROM CIRCUIT JUDGE, FOURTH CIRCUIT.

ARGUED OCTOBER 14, 1912.

DECIDED OCTOBER 23, 1912.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

DEEDS—*undue influence—constructive fraud.*

A bill in equity to cancel and set aside a deed which alleges weakness of mind and body, fear engendered by the grantee, and lack of independent advice on the part of the grantor, and undue influence on the part of the grantee, but which does not set up gross inadequacy of price, is not demurrable for the want of equity.

PLEADING—*bill to cancel deed—inadequacy of consideration.*

A general averment in a bill to cancel and set aside a deed that

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the price paid was so grossly inadequate as to render the transaction fraudulent, in the absence of a statement of any facts, is an allegation of a mere conclusion of law.

SAME—setting out or describing deed.

In a bill in equity to cancel a deed it is sufficient to describe the deed so that it may be identified and to plead its legal effect. The deed need not be set out in full.

OPINION OF THE COURT BY ROBERTSON, C.J.

This is a suit in equity to cancel and set aside a deed alleged to have been executed on the 26th day of June 1908 by Maria de Souza conveying certain land and personal property to Manuel Soares. The defendants demurred to the bill for want of equity, misjoinder of parties plaintiff and defendant, and because the deed in question was neither set out nor sufficiently described. A motion to amend the bill by striking out the name of Hilda Serpa, one of the plaintiffs, and that of Virginia Soares, one of the defendants, and to eliminate reference to the personal property, which was alleged to belong to said Hilda Serpa, was disallowed seemingly upon the ground that the bill even if amended would not state a case for equitable relief. The demurrer was sustained and the bill dismissed.

Regarding the suit as that of Maria de Souza against Manuel Soares, having for its object the rescinding of the conveyance of the land, we have a bill which, though crudely drawn, contains the following averments: That the defendant is the husband of the sister of plaintiff's deceased husband; that immediately after the death of plaintiff's husband the plaintiff and her children, at the request of defendant and his wife, Virginia Soares, went to reside with them at their home; that plaintiff was ill and her mind was affected; that the defendant and his wife, fraudulently conspiring to overcome the wish and will of the plaintiff and to acquire the ownership of her land, induced plaintiff to look upon them as her protectors and advisers, told her that her house was haunted by ghosts, and that she would suffer from illness if she should return there; that they importuned

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and urged her to convey her land to the defendant, assuring her that if she would go elsewhere to live she would recover from her illness; that on the 26th day of June 1908, the plaintiff being shaken and enfeebled by sickness and fear, suffering from bodily and mental weakness, relying on the defendant and his wife and believing what they told her, being frightened at what they said, overcome by their harassing influence, importunities and entreaties, and without having independent advice, yielded to the pressure, and against her own wish and will executed the deed in question and went to California. The bill alleges the willingness of the plaintiff to return the purchase money, and the refusal of the defendant to reconvey the land upon plaintiff's offer to return it, and prays that upon payment thereof by plaintiff to defendant the deed may be canceled and set aside. Damages are improperly alleged and prayed for but the demurrer does not reach that defect. It is averred that the consideration named in the deed, \$1250., of which only \$1100. was paid, was grossly inadequate and disproportioned to the value of the property and to such an extent as to render the transaction unconscionable and fraudulent. Counsel for the defendant presses the thought that as the actual value of the property is not stated the allegation as to inadequacy of price amounts to only a conclusion of law. We think the point is well taken. The general averment that the price paid was so grossly inadequate as to render the transaction fraudulent, in the absence of a statement of any facts, must be regarded as simply the conclusion of the pleader. It would be for the court to say whether, upon a certain state of facts, the purchase price was, as a matter of law, unconscionably inadequate. The allegation with reference to the purchase price would be amendable. But aside from the matter of inadequacy of consideration, the bill, as above shown, sets up weakness of mind and body, fear, and lack of independent advice on the part of the grantor, and undue influence on the part of the grantee. Such a state of facts would, if proven, entitle the plaintiff to the rescission of the conveyance in the absence of any countervailing equity.

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It is not the theory of this bill, as we understand it, that the plaintiff did not possess sufficient mental capacity to enable her to make a valid deed. The claim that the plaintiff was not a free agent but acted under the domination of the defendant and his wife in effect presupposes that the plaintiff did possess the requisite legal capacity. But the exercise of undue influence is itself a species of constructive fraud which will render voidable a conveyance of property made in obedience to its command. Gross inadequacy of price, if properly pleaded, would furnish an additional reason for scrutinizing the transaction. "Where there is no coercion amounting to duress, but a transaction is the result of a moral, social, or domestic force exerted upon a party, controlling the free action of his will and preventing any true consent, equity may relieve against the transaction on the ground of undue influence, even though there may be no invalidity at law. * * * The doctrine of equity concerning undue influence is very broad and is based upon principles of the highest morality. It reaches every case, and grants relief 'where influence is acquired and abused, or where confidence is reposed and betrayed.' It is specially active and searching in dealing with gifts, but is applied, when necessary, to conveyances, contracts executory and executed, and wills." 2 Pom. Eq. Jur. Sec. 951. And see *Harding v. Handy*, 11 Wheat. 103, 125; *Sears v. Shafer*, 6 N. Y. 268, 272; *Anthony v. Hutchins*, 10 R. I. 165, 176; *Shevlin v. Shevlin*, 96 Minn. 398, 412.

It is not necessary to set out the deed in full or to annex a copy of it to the bill. Its legal effect was pleaded and it was described by its date, the names of the grantor and grantee, and the lands conveyed. That was sufficient. 6 Cyc. 327, 328. The motion to amend the bill should have been allowed.

The decree appealed from is reversed and the case remanded to the circuit judge.

W. L. Stanley (*Joseph S. Ferry* on the brief) for plaintiffs.
Carl S. Carlsmith for defendants.

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CHARLES E. THOMPSON AND M. C. PACHECO v.
E. A. MOTT-SMITH, SECRETARY OF THE TERRI-
TORY OF HAWAII.

SUBMISSION UPON AGREED STATEMENT OF FACTS.

ARGUED OCTOBER 24, 1912.

DECIDED OCTOBER 25, 1912.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

ELECTIONS—*nomination papers construed.*

A nomination paper which is dated at Walluku, Maui, in the second senatorial district, which recites that an election for senators for the second senatorial district has been ordered, and requests the addressee to be a candidate for "senator for the Territory of Hawaii," and nominates him as a candidate for "said position," and is signed by the required number of electors, all of whom are electors of the second senatorial district, and to which is appended a written acceptance and declaration signed by the addressee that he is "qualified to be a candidate for senator for the second senatorial district," is construed and held to be a request to and nomination of the addressee to be a candidate for senator for the second senatorial district of the Territory. A paper in general form similar to that above described purporting to nominate the addressee to be a candidate for "representative for the Territory of Hawaii," held to be a request to and nomination of the addressee to be a candidate for representative for the third representative district of the Territory.

SAME—*statement by candidate of party affiliation or non-partisanship.*

The failure of a candidate to state, at the time of filing his nomination paper, by what political party he is nominated or his non-partisanship, will not require or justify the omission of the candidate's name from the official ballot.

OPINION OF THE JUSTICES BY ROBERTSON, C.J.

It has been made to appear that two persons, to wit, H. B. Penhallow and H. A. Baldwin, qualified for election in the premises, on or before the 5th day of October 1912, caused to be filed with the secretary of the Territory, nomination papers purporting to nominate and request them respectively to stand as

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candidates for election as senators at the approaching general election, and that six other persons, to wit, G. P. Cooke, P. J. Goodness, C. K. Makekau, A. F. Tavares, E. Waiaholo and J. Wilcox, each of whom is qualified for election as representative from and for the third representative district, on the 5th day of October 1912, caused to be filed with the secretary six several papers which respectively purport to be papers nominating and requesting them respectively to stand as candidates for election as representatives at said election; that each of said nomination papers was signed by upwards of twenty-five qualified electors of the second senatorial district and the third representative district (said districts being coextensive and embracing the counties of Maui and Kalawao); that each of said nominees has deposited the fee required by law to be deposited by candidates; and that the secretary of the Territory contends that it is his duty to print the names of said persons upon the official ballots for senators for the second senatorial district and representatives for the third representative district respectively for use at said election. The plaintiffs contend that the names of said persons should not be placed upon the ballots because of the following facts, to wit: That neither of said nomination papers of the said Penhallow or Baldwin is in law a nomination of or a request to either of them to stand as a candidate for the office of senator for the second senatorial district; that none of said nomination papers of the said Cooke, Goodness, Makekau, Tavares, Waiaholo or Wilcox is in law a nomination of or a request to any of them to stand as a candidate for election as a representative in or for the third representative district; and that none of said nominees, at the time of filing his nomination paper, stated to the secretary by what political party he was nominated, or his non-partisanship.

The nomination papers of said several nominees are in the same general form. The contention that the papers do not constitute nominations of or requests for the persons named to become candidates for senators or representatives respectively of

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any particular senatorial or representative district arises from the language used in the papers. Each of the papers of the nominees for senator is dated at Wailuku, Maui, September 19, 1912, addressed to the nominee, and contains the following: "The undersigned duly qualified electors in and for the County of Maui, Territory of Hawaii, in which an election for Senators for the Second Senatorial District to be held on Tuesday the 5th day of November, A. D. 1912 has been duly ordered, hereby request you to be a candidate for Senator for the Territory of Hawaii, and hereby nominate you as a candidate for said position, and hereby authorize you to file this request and nomination with the proper authorities as provided by law, as your authority to stand as such candidate." Then follow the names of the signatories, and, in conclusion, the written acceptance of the nominee of "the foregoing nomination," his declaration that he is "qualified to be a candidate for Senator for the Second Senatorial District, Territory of Hawaii," and the signature and address of the nominee. It is argued that as there can be no such thing as a candidate for senator for the Territory of Hawaii and as the paper does not nominate or request the nominee to be a candidate for senator for any specified senatorial district the paper is ineffective for any purpose. We agree with counsel for the plaintiffs that the acceptance and declaration of the nominee at the foot of the paper would be ineffectual to give validity to the document as a nomination paper if for the reason stated the attempted nomination should be held invalid. The acceptance and declaration show, however, the understanding of the nominee as to what he was requested to become a candidate for and what he consented to. In construing the paper we should assume that the persons who signed it intended to do something which they had a legal right to do, and that they did not intend to do a vain and frivolous thing. Section 31 of the Revised Laws provides that no person shall be permitted to stand as a candidate for election to the legislature unless he shall be nominated and so requested in writing, signed by not less than

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twenty-five duly qualified electors of the district in which an election is ordered, and in which he is requested to be a candidate. The persons who signed the paper are electors of the second senatorial district. They had no legal right or authority to request any one to become a candidate for senator except for the second district. Furthermore, the paper was dated at Wailuku, the county seat of the county of Maui, which is embraced in the legislative district mentioned, and it mentions that an election has been ordered for senators for the second senatorial district. In view of all this the only fair, reasonable and sensible construction that can be given the paper is that it is a nomination of the person addressed to be a candidate for senator for the second senatorial district and a request that he become such candidate. The court is in duty bound to give a proper and legal effect to the paper unless there is something on its face or in connection with it which would prevent its being given validity. In giving this paper the effect above indicated no violence whatever is done its language, and nothing is read into it which is not clearly inferable from the paper itself. The paper is construed according to the manifest intent of the parties who signed it. What we have said applies equally to the papers of the several nominees as candidates for representative. It is accordingly held that the nomination papers were sufficient in substance.

In regard to the second ground which has been asserted, it appears that at the time of the filing of the nomination papers none of the nominees stated by what political party he was nominated, but that later, and on or before October 17th, they each notified the secretary in writing, one, Mr. Cooke, by writing the words "republican party" across the face of his nomination paper, and the others by letter, that he had received the nomination of the republican party. Section 69 of the Revised Laws, as amended by Act 67 of the Session Laws of 1911, provides that "A ballot shall contain the name or names of the person or persons to be voted for, the office or offices for, and the

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district in which the election is being held, and the term or terms of the respective offices being voted for. The name or names of the candidate or candidates shall be printed with the Hawaiian or English equivalent, if such there be, if the candidate shall so request the Secretary of the Territory in writing at the time his nomination is filed with the Secretary of the Territory, and such candidate shall, at the time of filing his nomination papers, state by what political party he is nominated or his non-partisanship, as the case may be, in order that such party affiliation or non-partisanship may be printed on the ballot in front of the name of such candidate."

Counsel for the plaintiffs urge that the provision of that section that "such candidate shall, at the time of filing his nomination papers, state by what political party he is nominated or his non-partisanship, as the case may be," must be regarded as mandatory and that the information as to partisanship may not be supplied after the nomination paper has been filed. It is argued that the failure to make such statement at the time specified must result, not merely in the omission of the party designation opposite the name of the candidate on the ballot, but in preventing the printing of the nominee's name on the ballot. An analysis of the statutory provision above quoted shows that the only peremptory and invariable requirement as to the ballot is that it shall contain the names of the candidates, the office or offices for, and the district in which the election is being held, and the term or terms of the respective offices being voted for. Whether the Hawaiian or English equivalent of the candidate's name shall appear on the ballot depends on whether the candidate has requested it. The partisanship or non-partisanship shall be stated by the candidate, not as a prerequisite to the candidate's name being printed on the ballot, but, in the words of the statute, "in order that such party affiliation or non-partisanship may be printed on the ballot in front of the name of such candidate." There is no absolute requirement that the party affiliation or non-partisanship of each candidate shall be indi-

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cated on the ballot. There is no provision prohibiting the printing of a candidate's name on the ballot without such designation. We believe it to be clear, therefore, that the failure of a candidate to state his party affiliation or non-partisanship would not require or justify the omission of his name from the official ballot. Whether the names of the nominees in question should appear on the ballots with or without any party designation on the theory that the provision as to the time for furnishing the statement as to partisanship is mandatory so that it may not be received by the secretary except at the time of the filing of the nomination papers, or on any other theory, is a question not involved in this case, and no opinion is expressed as to it.

We hold it to be the duty of the secretary of the Territory to print the names of said nominees upon the ballots for senators or representatives, as the case may be, in accordance with their respective nominations, and authorize the entry of a judgment requiring him so to do agreeably with the prayer of the submission.

C. W. Ashford and R. P. Quarles (J. Lightfoot and J. L. Coke with them on the brief) for plaintiffs.

A. Lindsay, Jr., Attorney General, for defendant.

LUCY DE COITO v. MANUEL V. DE COITO.**APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.****ARGUED OCTOBER 31, 1912.****DECIDED NOVEMBER 9, 1912.****ROBERTSON, C.J., PERRY AND DE BOLT, JJ.****DIVORCE—*extreme cruelty.***

To constitute extreme cruelty there must be such violence or such a course of conduct as tends to endanger life, limb or health, or creates a reasonable apprehension of such result, thus render-

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ing continued cohabitation unsafe. The use of coarse and vile language and the giving of a single blow which caused no serious injury and created no reasonable apprehension of future danger to life, limb or health, there being some provocation and the complainant not being free from blame, held not to constitute extreme cruelty.

SAME—review of facts on appeal.

On an appeal from a decree in a divorce case the entire record is brought up and this court will draw its own conclusions as to the facts from a consideration of all the testimony. In cases turning wholly or largely on the credibility of witnesses and the weight of evidence much weight will ordinarily be accorded the findings of the trial judge.

OPINION OF THE COURT BY ROBERTSON, C.J.

The appellant instituted a suit for divorce against her husband alleging extreme cruelty. The parties were married on the 11th day of October 1911. The complainant testified, and she was corroborated at several points by other witnesses, that her brief married life was marred by a series of rows with her husband which began in the third week of that month and ended on April 3rd, 1912 when the parties separated; that her husband often used coarse and vulgar language to her and called her vile names, and that his attitude toward her and his treatment of her, even in the presence of others, was coarse, rude, fault-finding, and ill-mannered; and that he often said that he wished he had married another girl with whom he was acquainted. The complainant also testified that on two occasions, January 28th and February 7th, her husband slapped her face; that on April 2nd he told her that he wanted to go and live with his parents for a while so that his mother could give him treatment for some physical ailment with which he was troubled, and wished her to accompany him; that she refused to go because she was afraid of his father, and she offered to give him the treatment he needed herself; that he said she was not able to treat him and, leaving her, went to his parents' place; that the next day he returned home and told her that he had no further

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use for her and she had better return to her parents; that a few days after that he telephoned to her and asked her if she did not want to return to him; that she replied that she was so weak from his abuse that she would not return; and that she also received a letter from him in which he said that he was willing to live with her if she would come back to him. She testified that her husband's treatment of her had worried her, caused her to cry frequently, and caused her to faint more than once; and that she suffered from loss of appetite and of sleep, and had become thin and weak. The suit was instituted on April 11th. At the close of the testimony adduced by the complainant the respondent moved for the dismissal of the libel on the ground of insufficiency of evidence. The trial judge stated that a *prima facie* case had been made out and denied the motion. The respondent gave testimony in which he denied most of the testimony adduced against him as to the use of vile and vulgar language and as to ill-natured conduct; and he denied that he slapped his wife's face on the second occasion referred to by her. He admitted that on one occasion in the course of a heated argument he had called her a liar, and testified that at another time she had called him a liar. He admitted that following a wrangle on another occasion he had used vulgar language toward her in presence of her brother-in-law. And he admitted that on January 28th he slapped her face when she had called him "luny." He testified that he and his wife at times lived peaceably and happily and attributed their quarrels to the nagging and fault-finding on the part of the complainant, and to interference in their affairs by some of her relations. He testified that up to the time of the separation his wife slept well and had a good appetite, and denies that she has grown thin or weak, or has suffered any in health. His testimony is to the same effect as that of his wife in regard to his going to his parents' home and leaving her alone upon her refusal to go there with him; as to his telling her the next day that they had better separate; and as to the two unsuccessful attempts to get her to

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return to him. One witness who had been a next-door neighbor of these parties during the three weeks next preceding their separation testified that during that period until the day of the separation she had heard no disturbance of any kind at the house of these parties and that they appeared to be living happily. At the conclusion of the trial the circuit judge dismissed the libel, and entered a decree which states that the "case does not in the opinion of the court show facts to constitute extreme cruelty."

Under our former practice, when jurisdiction over divorce matters was exercised by the circuit courts and cases were reviewed by this court upon exceptions, it was held in a long line of cases that a decree in a divorce case had the effect of a verdict of a jury and could not be reversed as being contrary to the evidence if there was evidence to support it. But since the act of 1903 (Act 22 Session Laws of 1903) which transferred the jurisdiction of divorce cases to the circuit judges at chambers, divorce decrees have been reviewed upon appeal, and the entire testimony is examined as in appeals in equity suits. In such cases this court draws its own conclusions as to the facts from the evidence adduced, though in cases depending wholly or largely upon the credibility of witnesses and the weight of testimony much weight is accorded to the findings of the trial judge who saw the witnesses and heard them testify. In the case at bar the trial judge made no specific findings of fact, but, as above shown, after denying a motion to dismiss at the conclusion of the complainant's case, he dismissed the libel, after listening to the defense, upon the general ground that a case of extreme cruelty had not been established. He evidently believed the testimony of the defendant. Except as to admitted facts, and those put in evidence by the complainant which were not expressly contradicted, the case rests upon the credibility of the witnesses and the weight to be attached to their testimony. Counsel for the appellant contends that upon the undisputed facts alone a case of extreme cruelty was shown and

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that a single act of violence may be, and under the circumstances of this case should be, held a sufficient ground for dissolving the marital relation.

What will constitute extreme cruelty depends so much upon circumstances that no definition capable of application to all cases can be framed. The usual test is physical injury, either actual or apprehended. *Bartlett v. Bartlett*, 13 Haw. 707; *Bruns v. Bruns*, ante, p. 284. It is quite generally agreed that to constitute extreme cruelty there must be such violence or such a course of conduct as tends to endanger life, limb or health, or create a reasonable apprehension of such result, thus rendering continued cohabitation unsafe. 1 Bishop, M. & D. (6th ed.) Sec. 717. In Massachusetts "extreme cruelty" and "cruel and abusive treatment" is held to be such "as shall cause injury to life, limb or health, or create a danger of such injury, or a reasonable apprehension of such danger." *Bailey v. Bailey*, 97 Mass. 373; *Cowles v. Cowles*, 112 Mass. 298. And that where the evidence relied on is that of blows given on a single occasion the violence must be of such a character as to endanger life, limb or health, or as to create a reasonable apprehension of such danger. *Ford v. Ford*, 104 Mass. 198, 206. In *Beyer v. Beyer*, 50 Wis. 254, it was held that a single assault and battery constitutes cruelty when committed under circumstances which indicate that the defendant has so little control over his passions that he will be likely to repeat personal violence on any provocation. In *Albert v. Albert*, 5 Mont. 577, the court said, "We think one beating or whipping of a wife by her husband sufficient to establish the charge of extreme cruelty. * * * It is extremely cruel for a husband to beat or whip his wife even once. Mere words can never afford any provocation or excuse for such an act; no words can justify an assault." If the court meant to imply that a single blow given upon the provocation of words alone will always amount to extreme cruelty the ruling is inconsistent with the generally accepted view of extreme cruelty and is contrary to the weight of authority. It is a

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general rule that if the cruelty set up as a ground of divorce, if it was not excessive and out of proportion to the provocation, was provoked by the misconduct of the complainant a divorce will not be granted. 14 Cyc. 631, 632. If a violent act committed by the husband was brought on by improper conduct on the part of the wife, she might reasonably expect, by a change in her own conduct and behavior, to avoid the recurrence of violence in the future. In *Morris v. Morris*, 14 Cal. 76, it was held that a single blow, induced by some provocation, which results in no serious injury and creates no reasonable apprehension of future danger does not amount to extreme cruelty. *Hoshall v. Hoshall*, 51 Md. 72, and *Williams v. Williams*, 1 Colo. App. 281, are to the same effect. See also *Barrere v. Barrere*, 4 Johns. Ch. 189. In *Roelke v. Roelke*, 103 Wis. 204, 206, a suit for divorce on the ground of "cruel and inhuman treatment," the court said, "The only act of physical violence which was alleged or proved was a striking and choking of the plaintiff by the defendant on May 18, 1898. * * * Had a judgment of divorce been denied, we should probably not have interfered with the judgment. The case is certainly not a strong one. But the trial judge saw the parties, and could judge far better than we can whether or not the conduct of the defendant toward the plaintiff has been such as to make life intolerable and unsafe for the plaintiff. A single act of physical violence does not always justify divorce, even in connection with previous unhappy relations. Much must always depend upon the condition in life of the parties, their sensibilities and the effect of the acts complained of upon the party complaining; and all of these matters are peculiarly within the knowledge of the trial judge, and cannot be so well known to an appellate court. We do not, therefore, feel that we can reverse the findings of the trial court upon the question of divorce."

Whether a single act of violence is sufficient to constitute extreme cruelty will depend, therefore, upon the character of the violence, whether it is slight or serious, and upon the presence

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or absence of provocation. A blow given intentionally and without any provocation would generally give rise to the inference that it is likely to be repeated, thus raising a reasonable apprehension of danger. And the crucial question in this case is whether the evidence was such as to show that the health or physical safety of the complainant was endangered. The respondent's conduct toward his wife was cowardly and highly reprehensible, but there was evidence of some provocation and the violence was slight. The complainant was not free from blame. The parties are young and they have much to learn. Past troubles ought easily to be buried and forgotten in a spirit of mutual forgiveness and forbearance. We are not satisfied that the evidence as a whole shows injury to the health or gives rise to a reasonable apprehension of danger to the life, limb or health of the complainant, or that the circuit judge was wrong in holding that a case of extreme cruelty within the meaning of the statute had not been made out.

The decree appealed from is affirmed.

Lorrin Andrews for complainant.

W. T. Rawlins for respondent.

IN THE MATTER OF THE APPLICATION OF UNION
FEED COMPANY, AN HAWAIIAN CORPORATION,
FOR A WRIT OF PROHIBITION AGAINST
KALA KAAIHUE, AND WILLIAM HENRY, ES-
QUIRE, HIGH SHERIFF OF THE TERRITORY
OF HAWAII.

PETITION FOR WRIT OF PROHIBITION.

HEARD OCTOBER 28, 1912.

DECIDED NOVEMBER 11, 1912.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

PROHIBITION—*general rule—exceptions.*

The general rule is, that prohibition will not be granted until

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the question of jurisdiction has been raised without success in the lower court. To this general rule, however, which is one of practice rather than of jurisdiction, there are exceptions.

Id.—enforcement of execution prevented.

A writ of prohibition to prevent the enforcement of an execution on the ground of the invalidity of the judgment will be refused where there is an adequate remedy, either by motion in the lower court, or by appeal.

OPINION OF THE COURT BY DE BOLT, J.

This is an application to this court by the Union Feed Company, the petitioner herein, for a writ of prohibition to prohibit further proceedings in a certain action against the petitioner as garnishee and to prevent the enforcement of the writ of execution issued therein against the petitioner's property. A temporary writ of prohibition was issued and the respondents were directed to appear and show cause, if any they had, why the prohibition should not be made perpetual.

The petition alleges, in substance, that on August 21, 1909, Kala Kaaihue, as plaintiff, instituted an action in the district court of Honolulu, against Wallace Jackson, as defendant, and against the petitioner as garnishee, to recover judgment on a promissory note; that summons was duly issued and served on the petitioner, commanding it to appear and disclose as such garnishee; that the petitioner filed its answer disclosing that the defendant was in its employ at the time the summons was served on it, and that there was due from it to the defendant the sum of \$10; that on September 8, 1909, the cause came on for trial and judgment was entered for the plaintiff and against the defendant, but that no judgment or order whatsoever was entered against the petitioner as garnishee, and no further proceedings were had or taken therein against it; that an appeal was duly taken by the defendant from the judgment to the circuit court of the first circuit; that upon motion, without notice to the petitioner, the cause was set for trial in that court for September 23, 1912; that, without notice to the petitioner, and

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it not being represented, the cause proceeded to trial before the first judge of the circuit court, jury waived; that the circuit judge filed a written decision therein finding in favor of the plaintiff and against the defendant; that, notwithstanding the fact that the district magistrate had failed to enter any order commanding the petitioner to withhold any amount from any funds which might be within its control and due and owing to the defendant, and notwithstanding that the petitioner had never had notice of the appeal, or of the trial, and notwithstanding the fact that the petitioner made no appearance and was not represented at the trial, the circuit judge, on September 26, 1912, caused judgment to be entered against the petitioner, commanding it to pay to the plaintiff 25 per cent. of all salary, stipend, wages, annuity or pension which was due, owing and payable by it to the defendant at the time of service upon it of the district court summons, and 25 per cent. of all further salary, stipend, wages, annuity or pension which might become due, owing and payable by it to the defendant until said judgment should be fully paid, or until the defendant should quit the service of the petitioner; that, notwithstanding all and singular the facts mentioned, the circuit judge, on October 18, 1912, caused to be issued under the seal of the court a writ of execution upon said judgment, without the knowledge of or notice to the petitioner, directing a levy of the same upon the petitioner's property, as well as upon the defendant's property; that the writ is addressed to William Henry, the high sheriff of the Territory of Hawaii, and is now held by him in his official capacity, and that the same has not been fully executed, but will be forthwith duly executed upon the petitioner's property, unless the execution thereof shall be prohibited; that in the entry of said judgment the circuit judge acted without jurisdiction and in excess of the jurisdiction and authority conferred upon him in the premises, and that said judgment is null, void and of no effect, and the writ of execution is likewise void.

The prayer is, that a writ of prohibition issue prohibiting

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Kala Kaaihue from further enforcing or attempting to enforce said judgment, or said writ of execution, or from any further proceedings against the petitioner in connection with said cause, and prohibiting the high sheriff from proceeding any further in the matter of the enforcement or execution of said writ of execution, or from taking any further steps in or towards the execution of said judgment.

The respondents answered, admitting some of the facts alleged in the petition and denying others therein set forth. They deny the allegation, that no judgment or order was entered against the petitioner as garnishee, and allege that the district magistrate, upon the return day of the summons, orally directed the garnishee, then present and appearing by its secretary, to withhold 25 per cent. of all wages due and to become due from it to the defendant, and that at the time the judgment was entered in favor of the plaintiff and against the defendant the district magistrate also orally directed that the garnishee pay to the plaintiff 25 per cent. of all wages due and to become due from it to the defendant until the judgment should be fully paid. They also deny the allegation, that upon motion of the plaintiff the cause was set for trial in the circuit court without notice to the petitioner, and allege that the cause was set for trial by the court of its own motion after notice for that purpose had been published in the daily newspapers of Honolulu, and that the defendant was notified and was present at the trial. They also deny the allegation, that the petitioner had no notice of the appeal, and allege that the petitioner did have notice of the appeal, having signed the defendant's appeal bond for costs, as surety.

The respondents also allege as a further reason why the petition should be dismissed and the writ of prohibition denied, that the petitioner has made no attempt to have the cause reopened by the circuit court in order that any alleged injustice might be remedied or corrected, nor has it attempted or taken any step to have any alleged errors corrected by a writ of error,

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nor does it show or attempt to show that it is in any way prejudiced by the proceedings and judgment, or that it has not had more than sufficient of the funds or wages of the defendant to pay the judgment.

On the return day of the petition witnesses on behalf of the respective parties were sworn and testified as to the proceedings had in the district court. The evidence adduced by the petitioner tends to show that the district magistrate at no time orally or otherwise directed or ordered the petitioner as such garnishee to withhold any amount from any funds or wages due or to become due from it to the defendant. The evidence adduced by the respondents, it is claimed, shows just the contrary, namely, that on the return day of the summons, as well as at the time the judgment was entered, the district magistrate orally directed and ordered that the petitioner as garnishee withhold and pay to the plaintiff 25 per cent. of all wages due and payable and to become due and payable from the petitioner as garnishee until the judgment should be fully paid, or until the defendant should quit the service of the petitioner. The district magistrate's record, which was received in evidence, shows that judgment was given for the plaintiff against the defendant, but does not show that any order was made as to the garnishee. The evidence adduced by the respondents as to the alleged oral order by the magistrate, even if admissible, was so vague and uncertain that we cannot find as a fact that such an order was made. Whether, because of the failure of the magistrate to make any order respecting the garnishee, it ceased to be a party to the proceedings so that the circuit court was without jurisdiction to render judgment against it, we need not say, for even if there was a lack of jurisdiction the petitioner is not entitled to the writ under the circumstances of this case. The petitioner admits that it has made no application to the circuit court, by motion or otherwise, for relief; that it has taken no step whatsoever with the view of having the writ of execution quashed or recalled, or the judgment complained of set aside or reviewed.

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In other words, the petitioner admits that it has not availed itself of any of the remedies obviously at its command. The writ of prohibition "will not be granted to restrain proceedings for the enforcement of an execution, when adequate relief may be had by a motion addressed to the court from which the execution issued." High, Extra. Rem. (2d ed.), §770; *Ducheneau v. Ireland*, 5 Utah 108, 111; 2 Spelling, Inj. Extra. Rem. (2d ed.) §1727. The petitioner fails to show any necessity for the granting of the extraordinary writ of prohibition, which is a writ "to be used with great caution and forbearance." 32 Cyc. 598, 599. It is obvious that there are other plain and adequate remedies which the petitioner may invoke. The writ "issues only in cases of extreme necessity, and before it will be granted it must appear that the party aggrieved has applied in vain to the inferior tribunal for relief." High, Id., §765. "The extraordinary remedy by prohibition is confined at present, as when first employed, only to cases where it appears that the party seeking it has an actual grievance, and has applied without avail to the inferior tribunal for relief; and an application for a writ of prohibition will be denied where it does not appear that want of jurisdiction was pleaded in the court whose action is sought to be prohibited." 2 Spelling, Id. §1731. See also *Smith v. Whitney*, 116 U. S. 167, 169, 170, 173, 174; *In re Cooper*, 143 U. S. 472, 495; *In re Rice*, 155 U. S. 396, 402, 403; *In re The Mfg. Co.*, 184 U. S. 297, 301; *Walcott v. Wells*, 9 L. R. A. 59, 61, 62; *Ex parte Green*, 29 Ala. 52, 56; *Railroad Co. v. Newton*, 133 N. C. 136, 137; 23 Ency. Law 212, 213; 32 Cyc. 602, 603; 16 Ency. Pl. & Pr. 1109, 1128, 1130; *Atkins v. Siddons*, 66 Ala. 453; *State v. Mayer*, 52 La. Ann. 255; *State v. Burton*, 11 Wis. 50, 52.

The general rule is, as shown by the authorities cited, that prohibition will not be granted until the question of jurisdiction has been raised without success in the lower court. To this general rule, however, which "is one of practice rather than of jurisdiction," there are exceptions, such, for instance, as sum-

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mary proceedings for contempt. *Dole v. Gear*, 14 Haw. 554, 567, 578. And it does not always follow that because the question of jurisdiction may be determined on appeal prohibition will not lie. *Andrews v. Whitney*, ante, 264. The case at bar falls within that class of cases governed by the general rule.

It is also urged on behalf of the petitioner that, inasmuch as "it was not a party to the proceedings in the circuit court and had no notice of the trial before the circuit court, nor was it represented either personally or by attorney in the circuit court, it could not have excepted to the judgment nor have taken an appeal therefrom." Though the right of exception was not exercised and is not now available to the petitioner, it does not follow that other plain and adequate remedies were not and are not now available to it, such, for instance, as a motion to quash the execution or to set aside the judgment (14 Ency. Pl. & Pr. 97, 98), or appeal by writ of error (*Gear v. Henry*, ante, 101, 104).

The petition is dismissed and the writ denied.

W. B. Lymer (*Thompson, Wilder, Watson & Lymer* on the brief) for petitioner.

C. F. Peterson for respondents.

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IN RE ASSESSMENT OF TAXES WAILUKU SUGAR
COMPANY.

APPEAL FROM TAX APPEAL COURT SECOND JUDICIAL CIRCUIT.

ARGUED OCTOBER 30, 1912.

DECIDED NOVEMBER 15, 1912.

IN RE ASSESSMENT OF TAXES PAAUHAU SUGAR
PLANTATION COMPANY.

APPEAL FROM TAX APPEAL COURT FOURTH JUDICIAL CIRCUIT.

ARGUED OCTOBER 10, 1912.

DECIDED NOVEMBER 15, 1912.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

TAXATION—valuation of enterprise for profit—past history and future prospects and possibilities.

When a sugar-producing plantation has recently undergone extensive development through the acquisition or use of additional lands or water supply, it would be unsafe in determining the value of the aggregate property of the corporation for taxation purposes to place entire reliance upon the profits and dividends received from the three crops harvested since the extension, largely from virgin soil and at a time when prices of sugar were unusually high. Reasonable allowance must be made, as an intending investor would make, for a possible decrease of profits and dividends for the future due to possible reduction in the yield of cane and in the prices of sugar and increase in the cost of production.

In valuing the property of such a corporation as an enterprise as a whole intending purchasers consider chiefly the earning power of the property in the long run as shown by its past history and future prospects and possibilities. The main consideration is the future, the past being of importance chiefly in determining what the future is likely to be. The conservative, not the speculative, spirit should control in matters of assessments.

Id.—no one rule applicable in all cases.

In making such valuations no one rule can be justly followed in all cases, so varying are the factors that go to determine the values in different cases. The statute requires that in each case there shall be "taken into consideration" besides certain matters specially enumerated, "all other facts and considerations which reasonably and fairly bear upon such valuation."

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Id.—*valuation of Wailuku Sugar Company's plantation.*

Upon the evidence a valuation of \$3,600,000 is placed on the property of the Wailuku Sugar Company's sugar plantation for taxation purposes for the year 1912.

Id.—*valuation of Paauhau Sugar Company's plantation.*

A valuation of \$1,500,000 for the year 1912 placed on the sugar plantation of the Paauhau Sugar Plantation Company by the tax appeal court is sustained and the appeal of the Territory is dismissed.

OPINION OF THE COURT BY PERRY, J.
(ROBERTSON, C.J., DISSENTING IN WAILUKU SUGAR COMPANY
CASE).

These are appeals from decisions of tax appeal courts fixing the valuations of the property of the two corporations named as "enterprises for profit" for taxation purposes as of January 1, 1912. In the case of the Wailuku Sugar Company the property was returned at \$3,250,000 and assessed at \$4,250,000. The taxpayer thereupon accepted a valuation of \$3,500,000 appealing as to the excess and the tax appeal court fixed a valuation of \$4,250,000. The taxpayer expresses in this court, as it did in the tax appeal court, a willingness to accept a valuation of \$3,600,000. The Paauhau Sugar Plantation Company returned its property at \$1,400,000, the amount assessed was \$1,600,000 and the valuation by the tax appeal court was \$1,500,000. The present appeals are by the taxpayer in the first case and by the Territory in the second.

The statute authorizing assessment of "enterprises for profit" has been carefully considered and the principles applicable in cases of this nature have been clearly defined in former opinions of this court. No further discussion of these principles is necessary. We adhere to them. A few quotations will suffice. "The distinguishing feature of the Act * * * is that it requires several kinds or parcels of property when combined as the basis of an enterprise for profit to be assessed as a whole, whereas previously the several parts of such property had been assessed separately." *In re Tax Assessment Appeals*, 11 Haw. 235. "The tax

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in question is not an income tax, depending for its amount upon the income for the year preceding, but a tax on property the earning power of which is one of the most potent factors in determining its value. Nor is any single or arbitrary rule prescribed in the statute for estimating the value of the property. Not only could no rule be justly followed in all cases, so varying are the factors that go to determine the values in the different cases, but the statute itself provides that 'there shall be taken into consideration,' besides the matters specially enumerated 'all other facts and considerations which reasonably and fairly bear upon such valuation.' The question is, what is the fair and reasonable value of the property as a whole, *all* things considered; not, what is the arbitrary amount (which could scarcely be called value) that would be obtained by considering only certain things." *Ib.* 238. "In valuing the property as an enterprise as a whole, intending purchasers consider chiefly the earning power of the property in the long run as shown by its past history and future prospects and possibilities. The main consideration is the future; the past being of importance chiefly as a help in determining what the future is likely to be." *Ib.* 237. "An important question in considering the past of a plantation is whether it has been a growing or a declining plantation, as, for example, through changes in its water supply or the extent of its area of cultivation or in other respects,—this, of course, in so far as such changes tend to indicate what the future will be. In some districts for instance the rainfall, perhaps the only or principal source of the water supply, has been gradually diminishing, while in other cases, the supply, whether from rain, streams or wells, seems assured indefinitely. In some cases, a plantation may have apparently just taken a fresh start, or entered upon a new lease of life, as it were, through the acquisition of additional lands or water supply or a change in its variety of cane or a more extensive use of fertilizers, or for some other reason. In such a case the net profits of the past would not be of the same weight as they would be in other

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cases. And yet the prospects for the future in such a case should not alone be considered or the value be placed at once at the full amount which such prospects or anticipations may seem to some to justify, for experience may prove them to be largely illusory. The conservative, not the speculative, spirit should control in matters of assessment." Ib. 239. "The cash value of property at a given time is determined by what people then believe it to be worth, not by what it may turn out afterwards to have been worth. Consequently future prospects but not subsequent events may be considered." Ib. 241. "A very important point of difference between plantations is found in the character of their landed estates. A plantation which owns its land in fee simple is worth more than one which has only a leasehold interest. Some leases are long, others short. Generally only a portion of the land is held under lease, the proportion varying greatly. Often there are many leases expiring at different times. The probability of being able to renew the leases at fair rates or to purchase the land varies greatly." Ib. 241. "In some cases the plantation could continue well without the leased land, in other cases the land from its location or extent or for other reasons would be almost indispensable. Thus there are many circumstances to be considered." Ib. 241. "Just as the effect of many factors that go to determine the value of the property is shown largely by the net profits, so the effect of all the factors is shown largely by the actual sales of stock, for this shows what persons who actually invest consider the property to be worth. And yet here also distinctions must be made. Small blocks would generally sell at higher prices than large blocks. A large number of sales would be a surer test than a small number. It makes a difference also whether the purchasers are persons competent to judge or not. Allowances must also be made for high prices paid for special reasons, such as to obtain control, or because of sentiment, etc." Ib. 244. "Sugar plantation property may be worth its definitely ascertained salable or purchasable value or its value as shown by

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profits obtained or obtainable, depending upon skill or judgment as well as expenditure of money, the result being contingent upon variable factors of cost of production and market prices. It would be entirely unsafe to test values of corporation property solely by sales of shares of its stock or by prices offered without regard to the number of shares sold or bid for or whether they are bought for investment or speculative purposes. No hard and fast rules of testing values can be made to apply in all cases and yet practical common sense and a desire to assess at their fair value furnish an excellent guide." *Tax Assessor v. Wailuku Sugar Co.*, 18 Haw. 423.

With reference to the Wailuku Sugar Company the facts are as follows: On January 1, 1912, it had under cultivation 4439 acres owned in fee simple and 310 acres held under lease and in addition owned 145 acres of cane land not under cultivation, 130 acres of taro land, 20 acres of rice land, 2331 acres returned as pasture land, 5188 acres as forest land and 3830 acres as mountain land. The corporation owns all of the water used to irrigate the plantation. Always as an enterprise for profit, the aggregate property was assessed in 1906 at \$1,700,000, in 1907 and 1908 at \$2,000,000, in 1909 at \$2,400,000, in 1910 and 1911 at \$3,250,000. The sugar produced for the six years last past was: 1906, 7828 tons; 1907, 7426 tons, 1908, 10,072 tons; 1909, 17,761 tons; 1910, 16,942 tons and 1911, 16,198 tons; and the estimated crop for 1912 is 17,000 tons. Crops of from 16,000 to 17,000 tons may reasonably be expected for the immediate future. For the same six years the yield per acre and the profits have been as follows: 1906, 5.98 tons and \$130,739.15; 1907, 5.76 tons and \$93,203.27; 1908, 7.57 tons and \$281,097; 1909, 7.71 tons and \$546,697.78; 1910, 7.15 tons and \$601,968.03; and 1911, 7.11 tons and \$459,809.96. Twenty-five shares of the capital stock of the corporation changed hands in March, 1911, at \$165 a share. There was no evidence of any other sale of stock in 1911. The chief justice at the hearing in this court stated that in June, 1911, he sold twenty

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shares at \$172.50. The capital stock is \$3,000,000 divided into 30,000 shares of \$100 each. The average profits for the three years last past, that is, since the plantation's enlargement was completed, were \$536,158.39 and the average dividends for the same period \$517,500. Save as to such inference, if any, as may be drawn from the fact of its ownership of 2331 acres of "pasture land," no evidence was adduced as to whether the plantation is capable of further territorial expansion and, if so, what the cost of such expansion would be.

We think that the valuation of \$3,600,000 conceded by the taxpayer is sufficiently high and place the valuation of the property in question at that sum. The average net profits, \$536,158.29, and the average dividends, \$517,500, received for the three years last past would, perhaps, justify at the rate of capitalization, 12½ per cent., claimed by the Territory a higher assessment if they had been earned and paid through a longer period of years and under circumstances productive of greater certainty that the plantation would with respect to profits and dividends do as well in the future as it had done in the recent past. It requires no evidence to show that it was apprehended in this community prior to January 1, 1912, as it is now, that uncertainty exists as to whether the present tariff on sugar imported into the United States will be maintained and to what extent it will be decreased. It is equally true that on the assessment date there was, to put it mildly, a real uncertainty as to whether the unusually high prices of sugar then prevailing and which had prevailed for a few years would, considering solely the laws of supply and demand, be long maintained. So, too, the crops for 1909, 1910 and 1911 were largely grown on virgin soil just added to the planted area of the plantation. The price of labor, it is well known, has risen considerably in the recent past and will in all probability continue for some time to rise; and other items that enter into the cost of production are increasing in cost. To these considerations it is an insufficient answer to say that when the reduction in price or in the increase

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in cost of production shall come the assessments may be reduced. An intending investor considers all of these possibilities and probabilities *before* making the purchase and makes allowance for them in determining upon the price to be paid by him. It would be unsafe to place entire reliance upon the good showing of the three years now last past, just as it was in the opinion of the tax assessor as testified to by him unsafe in January, 1911, to place entire reliance upon the results of the two crops which had at that time been harvested from the plantation as enlarged. To prevent misunderstanding it may be added that the lesser annual profits and dividends for the years prior to 1909 cannot be permitted to operate in favor of a reduced assessment since the value to be sought is that of the plantation as enlarged and not that of the plantation as it existed prior to 1909. Reasonable allowance must be made, as an intending investor would make, for a possible decrease of profits and dividends for the future. A valuation of \$3,600,000 at the rate of capitalization claimed by the Territory, 12½ per cent., would require for its justification average annual profits of \$450,000. With average annual profits for the three years last past of \$536,158.29, a reduction of 269/1000 of one cent per pound in the price of sugar would suffice, assuming that in all other respects the excellent showing of the plantation would be maintained, to cause in a crop of 16,000 tons, a reduction of \$86,158.29 in the annual profits and under the same circumstances a reduction of 253/1000 of one cent per pound would cause the same reduction in the profits in a crop of 17,000 tons. It is worthy of mention in this connection that in 1911, with the benefit of high prices, some new land and an excellent yield per acre the profits were only \$459,809.96 as against \$601,968.03 in the preceding year. "The main consideration is the future, the past being of importance chiefly as a help in determining what the future is likely to be;" and "the conservative, not the speculative, spirit should control in matters of assessment." *In re Tax Assessment Appeals*, *supra*.

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The sales of twenty-five shares of stock at \$165 and of twenty shares at \$172.50 (assuming, but not deciding, that the latter may be considered as though it had been testified to at the trial) are worthy of but little, if any, weight in determining the value of a plantation whose capital stock is divided into 30,000 shares. So, also, we shall not attempt to arrive at the desired valuation by making comparisons with assessments judicially fixed for former years since that course would involve a study of all the circumstances bearing upon the former valuations as they existed at the assessment dates and the record before us does not purport to show all of those circumstances.

The Paauhau Sugar Plantation Company has a capital stock of \$5,000,000 divided into 100,000 shares of the par value of \$50 each. It has under its control about 50 acres of forest land and about 4800 acres under cultivation. It owns in fee the forest land and 985 acres of the cane land and holds under lease about 3900 acres. Of the latter about 1150 acres, being the land of Kalopa and extending throughout the center of the plantation from the sea to the forest, is owned by the Territory of Hawaii, the leases as to 1005 acres expiring in 1913 and as to the remainder in 1916. Owing to the present homesteading policy of the Territory it is practically certain that the use of the land by the corporation cannot be continued after the expiration of the present leases. Whether the homesteaders taking up the land will plant it to cane and sell their crops to the sugar corporation is, of course, entirely problematical. As to 450 acres of additional land the leases, all expiring within six years, are from individuals and can probably be renewed, although at increased rentals. The remainder of the leased land is owned in fee by three subsidiary corporations under the absolute control of the Paauhau Company.

The cane lands are irrigated in part. For the crop of 1912 it was the intention in January of that year to irrigate 1299 acres and leave 1333 acres unirrigated. The corporation is under a contract with a water company to take 20,000,000 gal-

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lons of water daily at a price of \$70,000 per annum, but has disposed of sufficient water to others to reduce the cost of the remainder to \$45,000 per annum. Owing to an abundant rainfall the remaining water has been for much of the time during the year the contract has been in operation not needed by the plantation and has run to waste into the sea.

The crops produced by the plantation for a few years last past with the cost of production per ton, profits earned and dividends paid have been as follows:

	Crops	Cost	Profits	Dividends
1905	8,006 tons	\$37.08	\$.....	\$.....
1906	8,795 tons	43.81	139,632.76	195,000
1907	7,857 tons	42.12	166,034.00	180,000
1908	10,448 tons	36.26	370,792.10	190,000
1909	9,315 tons	42.11	245,784.50	240,000
1910	7,493 tons	54.88	127,195.01	220,000
1911	8,411 tons	52.76	117,708.06	.....
1912	10,500 tons estimated			

Of the 10,500 tons estimated for 1912, 900 tons are expected to be furnished by homesteaders. The average annual profits for the six years were \$194,524.40 and the average annual dividends \$170,833.33. The three subsidiary corporations receive from the Paauhau Company total annual rents of \$9500, own no property other than that leased to the Paauhau Company and the total of their accepted assessments for January 1, 1912, is about \$133,000. For 1912 and succeeding years larger and more uniform crops would seem to be assured because of the increased supply of water for irrigation, but, on the other hand, the cost of labor and materials has increased in recent years and will probably continue to increase in the future. What has been said above with reference to the uncertainty of the tariff and of the prices of sugar applies to this case as well.

In 1911 one of the witnesses who testified before the tax appeal court purchased 100 shares of the capital stock of this company at \$16 and sold the same at \$21. C. Brewer & Company,

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the Honolulu agents of the corporation, purchased 2750 shares at \$24.34 per share, it being claimed by Brewer & Company that the purchase was made in deference to the view of some of the stockholders of the Paauhau Company that the agents should own stock in the Sugar Company and thus increase their interest in its welfare. The agency contract was worth to the agents from \$10,000 to \$12,000 per annum. In all about 8000 shares of stock of Paauhau Company were sold in 1911 at prices ranging from \$16 to \$25.50 per share. The Paauhau Company's property was assessed in 1905 and 1906 at \$1,400,000, in 1907 and 1908 at \$1,300,000, in 1909 and 1910 at \$1,500,000, and in 1911 at \$1,400,000.

In this as in the preceding case, without enumerating all of the circumstances disclosed by the evidence that bear upon the value of the plantation and which have been taken into consideration by us, we think that the valuation fixed by the tax appeal court, \$1,500,000, should not be increased and affirm the valuation appealed from. Whether that valuation is too high it is unnecessary to consider. The taxpayer has not appealed.

Much reliance is placed by the assessor upon the fact of the sales of stock in 1911 at prices as high as \$25 per share. But while this element is of greater importance in this case than in that of the Wailuku Sugar Company, it is not such as to overcome the force of the figures relating to the net profits and the dividends, the practically certain loss in the near future of the 1150 acres of government lands now under cultivation, the prospects for the immediate future as to production and its cost, the uncertainties already referred to and the other circumstances of the case.

The annual exhibit for December 31, 1911, filed by the corporation with the treasurer of the Territory as required by law, shows a valuation of its assets of over \$5,000,000. It is conceded, however, by counsel for the Territory that the values stated in the exhibit are unduly inflated,—for the purpose, possibly, of favorably affecting sales of stock. Whatever may have

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been their purpose, we attach no weight to the valuations there set forth. This is not a proceeding to punish the corporation for making an exhibit insufficiently founded on fact but merely to ascertain as nearly as may be possible the true value of the property of the corporation as an enterprise for profit as of January 1, 1912.

A. G. Smith, Deputy Attorney General (*Alexander Lindsay, Jr., Attorney General*, with him on the brief), and A. A. Wilder (*Thompson, Wilder, Watson & Lymer* on the brief) for the Assessor.

M. F. Prosser (*Kinney, Prosser, Anderson & Marx* on the brief) for Wailuku Sugar Company, and W. L. Stanley (*Holmes, Stanley & Olson* and *Smith, Warren & Hemenway* on the brief) for Paaauhau Sugar Plantation Company.

OPINION OF ROBERTSON, C.J., DISSENTING IN THE CASE OF
WAILUKU SUGAR COMPANY.

I agree that the valuation of the Paaauhau plantation should remain, as fixed by the tax appeal court, at \$1,500,000, but I think that \$3,600,000 is too low a valuation for Wailuku plantation, and it is altogether out of proportion to the Paaauhau assessment.

In deciding the cases reported in 11 Haw. 235 *et seq.* this court went very carefully into the consideration of the matter of assessing enterprises for profit, particularly sugar plantations, and laid down certain rules to be followed in valuing sugar properties which I believe have ever since been followed and which ought not to be departed from now. Applying those rules to the evidence in this case and giving the appellant the full benefit of every legitimate allowance I do not see how its property can be valued at less than \$4,000,000.

In *Inter-Island Steam Nav. Co. v. Shaw*, 10 Haw. 624, 639, it was held that while the earnings and the market value of the stock of a corporation should not be taken as the sole test in the valuation of its property, yet those are very important matters

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to be considered, and they furnish in most cases the best *datum* to start from. And in 11 Haw. 244, it was said that "Just as the effect of many factors that go to determine the value of the property is shown largely by the net profits, so the effect of all the factors is shown largely by the actual sales of stock for this shows what persons who actually invest consider the property to be worth."

The two sales of stock referred to, one at \$165 and another at \$172.50, were of small blocks and it is not to be supposed that the entire capital stock of the corporation could have been sold at those rates. Three hundred thousand shares at the first named rate would show a total valuation of \$4,950,000 and at the latter rate, \$5,175,000. Assuming that the second sale should not be taken into consideration, it would be fair and the appellant should not complain, if from the valuation of \$4,950,000 a discount of fifteen per cent. should be allowed. That would show a total net valuation of \$4,207,500. As a matter of fact actual sales of stock need not be shown. The statute requires that when the stock of a corporation is quoted on the market the market price thereof is to be taken into consideration in assessing the company's property. The stock of a company may seldom be dealt in but that fact does not necessarily show that the company is not a prosperous one. Frequently it indicates the opposite. Evidence of *bona fide* sales is valuable as showing what investors are ready to pay and have paid for the stock.

The net profits of a corporation show its earning power, and consideration must always be given to the amount of dividends, if any, which in past years have been paid to the stockholders. In the case of a sugar company the element of good-will does not figure and the amount of its profits have a direct relation to the intrinsic value of its property. But where a plantation has been developed, rehabilitated and put upon a new footing, its earning power as newly established is the important consideration. For this reason the profits of Wailuku plantation prior

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to the year 1909 should not be taken into the calculation. This phase of the subject was dealt with in 11 Haw. 239 as follows: "In some cases, a plantation may have apparently just taken a fresh start or entered upon a new lease of life, as it were, through the acquisition of additional lands or water supply or a change in its variety of cane or a more extensive use of fertilizers, or for some other reason. In such a case the net profits of the past would not be of the same weight as they would be in other cases." This plantation was valued on January 1st, 1907 at \$2,000,000 with an intimation that it might well have been regarded as being worth more than that sum. *In re Assessment of Wailuku Sugar Co.*, 18 Haw. 422. Since then the company has doubled its output and its capital stock, and trebled its profits, and its stock has been sold upon the market at more than sixty per cent. above par. In view of these circumstances it would be rather strange if the property was not worth double what it was at that date. The future outlook was no darker on January 1, 1912, than on January 1, 1907. This plantation's yield in 1906 was 7828 tons, and in 1907, 7426 tons, and its yield per acre during those years was less than six tons. Since then it has "entered upon a new lease of life." In 1910 the company doubled its capital stock, its plantation is in a position to put out between 16,000 and 17,000 tons of sugar annually, and since 1908 its average yield per acre has exceeded seven tons. It owns a large area of land in fee, but a small fraction of its cane land being held under lease. It is an irrigated plantation and has its own water supply. The plantation is well situated, in good physical condition, and has good prospects of maintaining its output, the estimated yield for 1912 being 17,000 tons. Considered on the basis of capitalization of profits such a plantation, according to the rule laid down in 11 Haw. 244, should be subjected to a rate of 12 or 12½ per cent. The court there said, "It seems to us that a sugar plantation under favorable conditions, as, for example, one that owns its land in fee, has for a period of years paid say, 12 or 12½ per cent and

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has besides been maintained in a state of efficiency and has every prospect for doing as well in the future as it has done in the past, would generally be considered to be worth par." And in fixing the values of the plantations which were then under consideration special reference was made to the amount of dividends paid to the stockholders during a number of years. What the court there said as to a plantation's "prospect for doing as well in the future as it has done in the past" is to be understood as applying to the condition and situation of the plantation, and, not as counsel for the appellant would have it, as referring to the effect of possible unfavorable legislation. There were broad uncertainties depending on national action existing at the time those cases were decided and they were adverted to in another part of the opinion of the court. The condition of the cane sugar industry in these islands is no less stable now than it was in 1897 when the cases referred to were decided. It is generally acknowledged that all business and industry in this Territory was put upon a sounder basis when these islands were annexed by the United States. In 1897, as now, there seemed to be considerable uncertainty as to what the future would bring forth. Uncertainty has prevailed ever since it was conceived that protection is essential to the profitable prosecution of the sugar industry and the feeling becomes acute whenever agitation is made for the removal or reduction of the tariff on raw sugar. This uncertainty affects to some extent nearly all values in this Territory, but especially those of sugar properties. On January 1st, 1912, as it is now, it was impossible to predict what, if any, change might be made in the sugar tariff. As to market prices, the prospects at that time were that fair prices would be obtained for the 1912 crop. The market price of sugar fluctuates considerably and sometimes unexpected events cause sudden changes in the world's market. Yet comparatively small fluctuations in the world's price may make the difference between a profit and a loss to a Hawaiian sugar plantation. It is because of these uncertainties that this court has recog-

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nized the fact that it would be unfair to base the value of a sugar plantation upon a consideration of the profits of a single profitable year, or to assume that large profits are assured for the future because they have been realized for several years past. And it is because of this that in basing an estimate of value upon the capitalization of past profits very liberal rates are authorized. If Wailuku's last year's dividend of \$540,000 was assured indefinitely it would be absurd, of course, to think of assessing the property at only four million dollars. What effect upon the intrinsic value of sugar properties threatened tariff legislation will have cannot be calculated until the legislation has been accomplished and its nature ascertained. In the mean time at least the carefully considered rules laid down by this court in 1897 should be adhered to.

It is true, as held in 11 Haw. 237, that assessments should not be changed from year to year for light reasons, but under our system of taxation property is valued each year and assessments may be and should be increased or decreased to meet changes in conditions which materially affect values. If, as it is contended it will happen, the cost of production of sugar will continue to increase, market prices decline, and profits shrink good reason will doubtless be furnished for reducing the assessments on sugar properties in future years.

The average annual yield of the Wailuku plantation for the past three years was 16,964 tons, and the estimated yield for the present year was placed by the manager at 17,000 tons. Its net profits for the last three years averaged \$536,158. The dividends paid to its stockholders during the three years averaged annually the sum of \$517,500. The capitalization of those dividends according to the rule heretofore held applicable to a plantation such as this, i. e. at the rate of 12½ per cent., will show a value of \$4,140,000.

A comparison of Wailuku plantation with Paauhau plantation and the valuation fixed upon the latter shows that an assessment of the former at \$4,000,000 would be very fair to the

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company. Paauhau paid no dividend in 1911 but it made a net profit of \$117,708 in that year. Regarding that sum as available for dividends during that year and adding it to the dividends paid during the five years next preceding it would show an average annual dividend over a period of six years of \$190,451, which capitalized at the rate of 12½ per cent. would show a valuation of \$1,523,608. Its assessment has been fixed at \$1,500,000. In the Paauhau case the evidence of sales of stock is entitled to little or no weight. The purchase made by C. Brewer & Company was for a special reason, and the company's corporation exhibit which, to put it very mildly, was highly inflated and misleading may have deceived purchasers and paved the way to stock juggling. To assess Wailuku plantation at \$3,600,000 is, upon the capitalization of profits basis, at the rate of about 14 1/3 per cent. But Wailuku plantation is in situation, condition and stability far superior to Paauhau and its future prospects are much brighter. To assess Paauhau at \$1,500,000 and Wailuku at \$3,600,000 is to do a gross injustice either to Paauhau in its case or to the government in the Wailuku case, or, possibly, to one and the other in each case. It is true that as the Paauhau company did not appeal from the valuation fixed by the tax appeal court this court cannot reduce the assessment. But the Paauhau company returned its property at \$1,400,000, and even if it should be conceded that that company is over assessed at \$1,500,000 it would not prove that Wailuku would be over valued at the sum of \$4,000,000. There is nothing in the record that will warrant the inference that the property could have been purchased on the first of January last at less than that figure, or at the rate of \$133.33 per share of stock. The statute provides that property shall be assessed at its full cash value. Discrimination between different taxpayers, unless based on real differences in circumstances, is even more objectionable than general excessive taxation. 11 Haw. 242. In the cases at bar the more stable plantation is assessed upon a basis more favor-

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able to the company than that applied to the less fortunate concern. It seems to me that the majority opinion, while purporting to follow the principles laid down in the cases in 11 Haw., in effect repudiates some of them, and tends to set adrift the whole subject of sugar plantation assessment. No new rules are enunciated which might serve as future guides to tax assessors and taxpayers in place of those which have been set aside.

YOUNG CHUN, DOING BUSINESS AS YE LIBERTY
THEATRE, v. BLONDIE ROBINSON.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED NOVEMBER 20, 1912.

DECIDED NOVEMBER 27, 1912.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

~~EQUITY—injunction—bond—counsel fees—costs.~~

Damages consequent upon the dissolution of a temporary injunction are not recoverable in the absence of a bond to secure their payment, unless malice and want of probable cause in the procurement of the injunction are shown. In such a case counsel fees are not taxable as costs.

OPINION OF THE COURT BY DE BOLT, J.

The complainant having filed his bill in equity praying that the respondent be restrained from performing as a comedian, and a temporary injunction having issued restraining the respondent as prayed for, and the complainant having filed a bond "to fully indemnify" the respondent "for all costs and damages" which he "may be required to pay or sustain, not exceeding the penalty of the bond, if it should be finally adjudged that said temporary injunction was wrongfully, oppressively and maliciously sued out," and the injunction, on appeal to this court (ante 70), having been dissolved and the cause re-

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manded to the circuit judge, the respondent thereupon presented his motion for assessment and award, under the bond, of attorneys' fees and costs, and the circuit judge having rendered a decision declining to consider the motion on the ground that he had "no power and should not attempt to exercise a discretion" in the matter, which decision, on appeal to this court (ante 193), also having been reversed and the cause again remanded, the respondent thereupon presented a second motion, moving "that damages in the sum of two hundred and fifty dollars be assessed and awarded against the complainant for attorneys' fees, and that the further sum of twenty-two dollars and seventy-five cents be assessed and awarded as damages against the complainant for court costs."

Upon the hearing of this motion evidence was adduced as to the reasonable value of the services rendered by counsel, whereupon the circuit judge, in his decision awarding counsel fees to the respondent, said: "There being no bond on which to depend the court is of the opinion that while damages could not be awarded, attorney's fees and costs may in an action of this kind be awarded to the attorney for the respondent. Following this opinion the fee of \$250 is awarded as counsel fees, and costs are taxed at \$13.50." From this decision the complainant appeals, which appeal is now before us for consideration.

It will be observed that the respondent, by the second motion, seeks to have counsel fees assessed and awarded to him against the complainant personally and not upon or by reason of the bond. The bond is eliminated from the case and is not now before us for consideration. The question thus presented by the record for our determination upon this appeal is the same as if no bond had ever been filed. It will also be observed that the motion is not based upon any claim of malice or lack of probable cause in suing out the injunction.

It appears from the language of the motion that the respondent was proceeding upon the theory that counsel fees were to be awarded as damages, while at the oral argument in this court

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it was urged on behalf of the respondent that counsel fees were costs and to be taxed as such. The circuit judge, apparently, was of the opinion that counsel fees were costs and not damages. Counsel fees, however, are not costs, and cannot be taxed as such. "The word costs is a word of known legal signification. It signifies, when used in relation to the expenses of legal proceedings, the sums prescribed by law as charges for the services enumerated in the fee bill. Costs are only recoverable by force of a statute, and the allowance of them, in any case, will depend on the terms of the statute." *Apperson v. Mut. Ben. L. Ins. Co.*, 38 N. J. L. 388, 390. The word "costs," ordinarily, does not include counsel fees. The general rule is, in the absence of statute, that counsel fees are not costs; and this rule applies alike to suits in equity and actions at law. 5 Ency. Pl. & Pr. 228; 11 Cyc. 104. The respondent cites the case of *Nott v. Silva*, 16 Haw. 635, upon which he relies as supporting his contention, that counsel fees are costs. That was an action of assumpsit, wherein the plaintiff obtained judgment in the district court for \$97.57, exclusive of costs, which was reduced to \$72.50, that is, more than one-fifth, on the defendant's appeal to the circuit court. The question there presented was, which party was entitled to the attorneys' fees allowed by section 1892 of the Revised Laws? The plaintiff conceded that all ordinary costs should be allowed the defendant, but the defendant contended that the attorneys' fees should also be allowed him on the theory that they were costs. The court held, however, that the attorneys' fees allowed by the statute (R. L. §1892) were not costs. When the court said, "Much can be said in support of the view that such fees are costs generally speaking" it referred to attorneys' fees which the statute expressly provides for in actions of assumpsit. The decision in that case, of course, does not support the respondent's contention, but on the contrary supports the contention of the complainant.

Inasmuch as counsel fees are not costs and cannot be taxed as such, it follows, therefore, that if they are to be allowed at

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all in this case, they can only be awarded as damages. On the second occasion when this case was before us, upon the question of counsel fees, we said: "It is the established rule in this jurisdiction that counsel fees, as well as costs and other charges or damages, paid or sustained to obtain the dissolution of a restraining order, are damages directly and proximately resulting from the issuance of an injunction under circumstances like those in the case at bar, and are recoverable." Ante 195. Counsel for the respondent urges that the language just quoted sustains his present contention, namely, that counsel fees may be awarded independently of the bond. The language used cannot be so construed. What we there said must be read and applied according to the facts then before us. It will be observed that the motion, under which the respondent was then proceeding, was "for assessment and award, under the bond," of counsel fees and costs; whereas, he is now proceeding under another motion, whereby he seeks to have counsel fees and costs assessed and awarded to him against the complainant personally, eliminating the bond entirely from consideration. The authorities are uniform in holding that no damages can be awarded upon the dissolution of an injunction in the absence of a bond or other security given to indemnify the party against whom the injunction issues, except in cases of malice and want of probable cause. The case of *Russell v. Farley*, 105 U. S. 433, supports this view, holding in positive terms that no damages can be awarded in the absence of a bond, except upon the theory of malice. The opinion of the court in that case is an interesting and instructive one upon this subject. In the course of its discussion of the case the court adverts to the history and theory of the liability incurred by reason of the issuance of an injunction. The case was cited with approval in *Meyers v. Block*, 120 U. S. 206, 211, wherein the court said: "Without a bond no damages can be recovered at all. Without a bond for the payment of damages or other obligation of like effect, a party against whom an injunction wrongfully issues can re-

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cover nothing but costs, unless he can make out a case of malicious prosecution. It is only by reason of the bond, and upon the bond, that he can recover anything."

The opinion of the court in the case of *City of St. Louis v. The St. Louis Gaslight Co.*, 82 Mo. 349, 353, 355, is also an interesting and instructive one upon the question now before us. We quote from that opinion as follows: "When temporary injunctions were granted, as they frequently were upon the naked petition and *ex parte* showing of the applicant, and were afterwards dissolved on a final hearing of the cause, neither law nor equity furnished any remedy to the defendant for the damages consequent from them, however serious they might be. Such damages were regarded as flowing from the judgment and order of the court, and not from the plaintiff, if he did nothing more than to sue in good faith for the process awarded him. The injustice which so often resulted from hasty and unfounded orders of injunction, for the consequences of which the courts alone were responsible under the law, induced them to adopt as far as was in their power such measures and safeguards as might afford the defendant an indemnity against loss and injury from injunctions which ought never to have been granted. Hence arose the doctrine which recognized in courts of equity the inherent power of exacting conditions, deposits and bonds from the plaintiff before awarding him an injunction, which should in one way or another indemnify the defendant for damages suffered by him in consequence of the process discontinued or dissolved by the court at final hearing. These safeguards were originally exacted in *ex parte* hearings, but came to be required in all interlocutory injunctions, whether granted upon notice to defendant or without a hearing from him. These conditions, deposits and bonds were all in the nature of voluntary obligations on the part of the plaintiff to pay damages to the defendant in the event of a dissolution at final hearing. The method of enforcing them depended upon their nature; some were enforced by the courts of equity, while oth-

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ers were more appropriately enforced by an independent action at law. *Bein v. Heath*, 12 How. 168. Thus it will be seen that the liability of the plaintiff in an injunction suit to respond to the defendant for damages after dissolution depended upon his voluntary undertaking contained in the conditions of the decree, or in his separate agreement and bond given to the court or defendant for that purpose. Of course, when the process has been sued out maliciously there may be a right of action in favor of the defendant. But this right depends upon the law governing malicious prosecutions, and has no relation to the claim for damages urged by defendant in this case. In *Palmer v. Foley*, 71 N. Y. 106, Judge Folger expresses this condition of the law: 'It seems that without some security given before the granting of an injunction order, or without some order of the court or a judge, requiring some act on the part of the plaintiff which is equivalent to the giving of security such as a deposit of money in court—the defendant has no remedy for any damages which he may sustain from the issuing of the injunction, unless the conduct of the plaintiff has been such as to give ground for an action for malicious prosecution. In *Russell v. Farley*, 105 U. S. 433, Justice Bradley, in alluding to the practice of courts of chancery in granting injunctions, says: 'And if the legal right is doubtful, either in point of law or of fact, the court is always reluctant to take a course which may result in material injury to either party, for the damage arising from the act of the court itself is *damnum absque injuria*, for which there is no redress except a decree for the costs of the suit, or in a proper case, an action for malicious prosecution. To remedy this difficulty the court, in the exercise of its discretion, frequently resorts to the expedient of imposing terms and conditions upon the party at whose instance it proposes to act.' Such exemption of the plaintiff from damages, in the absence of any terms or conditions accepted by him to pay them, rests upon the broad policy of the law which regards the courts open at all times to all persons for the enforce-

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ment of their rights by civil action. Suitors are presumably acting in accordance with law when they obtain in the courts what the courts award them, and should not be punished for accepting what they could not obtain except by such orders and judgments. When a suitor procures a writ or order of injunction upon a fair presentation of facts to the court in good faith he has never been regarded as responsible in damages therefor, either in law or equity, unless he has made himself so by some voluntary undertaking. In such case he stands before the law like a suitor in any other process or proceeding. This I understand to be the rule, as universally recognized and approved." See also *McLaren v. Bradford*, 26 Ala. 616; *Mark v. Hyatt*, 18 L. R. A. 275; *Robinson v. Kellum*, 6 Cal. 399; *Sturgis v. Knapp*, 33 Vt. 485; *Lexington & Ohio R. R. v. Applegate*, 8 Dana (Ky.) 289, 310, 311; 22 Cyc. 1061.

The bond filed by the complainant not being relied upon by the respondent, the circuit judge was without power to award counsel fees. He had power, however, to tax costs. The decision appealed from, therefore, is reversed so far as it purports to award counsel fees to the respondent, but it is affirmed as to costs taxed in the sum of \$13.50. The cause is remanded.

W. B. Lymer (*Thompson, Wilder, Watson & Lymer* on the brief) for complainant.

J. A. Magoon and *N. W. Aluli* for respondent.

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IN RE COMPENSATION TO BE PAID BY HILO RAILROAD COMPANY, FOR LAND TAKEN FROM H. S. RICKARD FOR RAILROAD PURPOSES AND DAMAGE DONE TO ADJACENT LAND, INCIDENTAL TO ITS USE FOR SUCH PURPOSE. R. W. LOT NO. 141.

IN RE COMPENSATION TO BE PAID BY HILO RAILROAD COMPANY, FOR LAND TAKEN FROM MRS. ANNIE RICKARD, WIFE OF H. S. RICKARD, FOR RAILROAD PURPOSES AND DAMAGE DONE TO ADJACENT LAND, INCIDENTAL TO ITS USE FOR SUCH PURPOSE. R. W. LOT NO. 145.

APPEALS FROM CIRCUIT JUDGE, FOURTH CIRCUIT.

SUBMITTED NOVEMBER 15, 1912.

DECIDED NOVEMBER 30, 1912.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

ARBITRATION AND AWARD—*jurisdiction—entry of submission as a rule of court—revocation.*

Under chapter 142, R. L., relating to arbitration, to give the court jurisdiction over the subject matter and the parties it is necessary that the written submission be entered as a rule of court; and until the submission is so entered either party may revoke the agreement, regardless of whether the award has been already placed on file.

Id.—*entry of rule of court, nunc pro tunc.*

In a proceeding under the chapter named a submission to arbitration may not, after revocation of the agreement by one of the parties, be entered as a rule of court as of the date of the acknowledgment of the submission before the judge.

Id.—*judgment without rule of court.*

A judgment entered upon an award without the submission having been first lawfully entered as a rule of court is invalid.

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OPINION OF THE COURT BY PERRY, J.

In each of these cases the parties entered into an agreement in writing to submit to three arbitrators named the determination of a controversy as to the amount of compensation to be paid by the railroad company for the taking of certain parcels of land and for the injury done to certain other parcels by depositing thereon earth, rocks and other debris. In the agreements it was provided that the awards of the arbitrators, when rendered, should be entered up as judgments of the circuit court of the fourth circuit of the Territory of Hawaii. The agreements were dated June 10, 1912, and on the same day were acknowledged by the parties and their attorneys before the circuit judge of the fourth circuit and were endorsed by the clerk of that court as filed. Neither agreement, however, was at that time entered as a rule of court. The awards were filed in the circuit court on June 15 and on July 13 the railroad company moved that the awards be confirmed and entered up as judgments of that court. On July 23, before action on the motions, the landowner in each case filed a written revocation of the submission and on July 29 a statement of objections to the entry of judgment on the ground, among others, that the submission had not been entered as a rule of court and that the court was without power to enter judgment on the award. On August 16, against the landowners' objections, the court made an order in each case, "as of the tenth day of June, 1912," that the agreement of arbitration be entered as a rule of court and on August 22 judgments were entered upon the awards. The cases come to this court on the landowners' appeals from the decisions and judgments of the circuit court.

The only question necessary to be considered is whether the circuit court had jurisdiction under the circumstances to enter the submissions as rules of court *nunc pro tunc* and to enter judgments upon the awards.

In referring their controversies to arbitration the parties ob-

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viously were not proceeding under the provisions of chapter 64 of the Revised Laws, as amended by Act 86 of the Laws of 1909, relating to railways and their powers of eminent domain. for the arbitrators were chosen by the parties themselves and were not appointed by a justice of the supreme court; and the judgments cannot be sustained on the theory that these were common law submissions, because the jurisdiction to enter a judgment, enforceable by execution, upon an award in a case not pending before the court is special and statutory and did not exist at common law. 3 Cyc. 798, 776; *Fortune v. Killebrew*, 86 Tex. 172, 177.

The judgments can be sustained, if at all, only on the theory that the submissions were under chapter 142 of the Revised Laws which provides in section 2187 that "all controversies, which might be the subject of a personal action at law, or of a suit in equity, may be submitted to the decision of one or more arbitrators, in the manner provided in this chapter." Sections 2188 and 2189 of the same chapter are as follows: "The parties to any such controversy may agree in writing to submit the same to the decision of one or more arbitrators named in the agreement or to be appointed in such manner as the parties shall agree upon, stipulating that the award of such arbitrators when rendered shall be entered up as a judgment of any court of record or district court of the Territory mentioned in such agreement." (Sec. 2188.) "The parties shall appear personally, or by attorney, before the district magistrate or any judge of the court of record agreed upon, and upon their acknowledging the execution of the written submission and producing the same before such magistrate or judge, he shall cause the same to be entered as a rule of court; after which neither party shall have a right to revoke the submission without the consent of the other." (Sec. 2189.) The language of section 2189 is unambiguous. The provision that after the submission is entered as a rule of court neither party shall have the right to revoke the submission without the consent of the other carries with it

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the very clear implication that until such entry either party may so revoke. It is true that at the common law the right to revoke ceased with the rendition of the award, but these judgments cannot be sustained partly under the statute and partly by reference to the common law. The parties were at liberty to submit to arbitration under the common law (*Merrill v. Lenehan*, 4 Haw. 670; *Bruner v. Brewer & Co.*, 20 Haw. 627) with the consequent limitations concerning the methods of enforcement of the awards; but if they chose to proceed under the statute it became incumbent upon them to comply with its essential requirements. The procedure prescribed by the statute is not in accordance with the ordinary process of law and to give the court jurisdiction of the subject-matter and of the parties the steps enumerated, to wit, acknowledgment and production of the agreement and its entry as a rule of court, were essential. For the entry of the rule the consent of the parties was necessary and until the entry was actually made it was competent for either party to withdraw its consent. The failure to enter the submission as a rule of court was a defect of such a character that it could not be remedied by a mere waiver.

Statutes relating to arbitration differ so greatly in their provisions that but little assistance can be derived from adjudicated cases. A few, however, may be here referred to.

In *Ryan v. Dougherty*, 30 Cal. 219, the court said: "Persons capable of contracting may submit by writing to arbitration any controversy which might be the subject of a civil action between them, except a question of title to real property in fee or for life. (Pr. Act, secs. 380, 381.) But it does not follow that because a matter in difference between parties may be submitted by them to arbitration that a Court of record or any other Court will thereby acquire jurisdiction of the subject-matter in controversy or of the parties litigant. If the parties stipulate in the submission that the same may be entered as an order of the District Court, and cause the submission and stipulation to be filed with the Clerk of the county where one

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of the parties resides, such Clerk, who is *ex officio* Clerk of the Court named, shall enter in his Register of Actions a note of the submission, with the names of the parties, the names of the arbitrators, the date of the submission, when filed, and the time limited by the submission, if any, within which the award shall be made. (Pr. Act, sec. 382.) By the concurrence of these several conditions, the Court obtains jurisdiction of the subject-matter of the controversy and of the persons of the parties, and power over the arbitrators."

"The provisions of the statute upon the point are not to be mistaken: 'The Clerk shall thereupon enter in his register of actions a note of the submission, with the names of the parties, the names of the arbitrators, the date of the submission when filed,' etc. (Sec. 382.) He must in the first place be authorized by the stipulation to make note in his register, and in the second place he must, in fact, make it there—the mere authority without the act done is no more than the act done without the authority would be. Both these must concur (*Ryan v. Dougherty*, 30 Cal. 218), and in the absence of either there is no jurisdiction over the subject-matter or the parties." *Pieratt v. Kennedy*, 43 Cal. 393.

Under a statute providing that upon the filing of the submission the clerk shall "enter on his register of actions a note of the submission, with the names of the parties, the names of the arbitrators, the date of submission, when filed, and the time limited by the submission, if any, within which the award shall be made" the supreme court of Nevada said: "This is a special, not the ordinary mode for recovery of a judgment, the requirements of the statute authorizing it are not idle, useless formulae; they are mandates of law not to be disregarded and must be substantially complied with." *Steel v. Steel*, 1 Nev. 27.

"In the absence of these necessary preliminary steps" (a written submission and entry of note thereof on the record) "there is no foundation for the judgment of the court. Indeed, in their absence, the statute has not given to the court the power and authority to render judgment upon an award of arbitrators.

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In such a case the judgment is void." *Carson v. Carson*, 58 Ky. 434.

"The remedy pursued in this cause to enforce the award of the arbitrators is statutory and can only be adopted when the submission follows the direction of the statute." *Coffin v. Woody*, 5 Blackf. (Ind.) 423.

"The record in this case fails to show that the arbitration was made a rule of court by the parties filing in the court the statement required by section 1222, Revised Statutes of 1892, and fails to show the recording of the same in the minutes of the court as required in said section. This was a requirement which under the terms of the statute was jurisdictional and necessary to confer any power upon the arbitrators or umpire." *Readdy v. Electric Co.*, 41 So. (Fla.) 535. See also *Heslep v. City of San Francisco*, 4 Cal. 1; *Kettleman v. Treadway*, 65 Cal. 505; *Railroad v. Cooper*, 59 Minn. 290.

In *Academy v. Fletcher*, 33 Pac. (Cal.) 855, relied upon by the appellee, the submission contained an express provision that it "may be entered as an order of the superior court * * * at any time" and the decision was based in part upon that consideration. Aside from this the conclusion supporting the judgment, rendered under circumstances similar to those in the case at bar, was based upon the view that the agreement could not be revoked after the filing of the award,—an attempt to rely both on the common law and on the statute. The reasoning in that case does not appeal to us as sound.

Whether the awards are valid and enforceable as common law awards is a question not presented by these appeals.

In our opinion the orders *nunc pro tunc* and the judgments are invalid. The appeals are sustained and the judgments set aside.

C. S. Carlsmith for Hilo Railroad Company.

Smith, Warren & Hemenway and *E. W. Sutton* for H. S. Rickard and Annie Rickard.

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SAMUEL M. KANAKANUI, TRUSTEE, AND YEE WO
v. EMMA A. DE FRIES.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED NOVEMBER 19, 1912.

DECIDED DECEMBER 4, 1912.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

LANDLORD AND TENANT—*relief in equity against forfeiture of lease.*

Equity will not relieve a lessee from a forfeiture for breach of condition where the breach has been wilful and persistent and was not induced by any act of the lessor.

OPINION OF THE COURT BY ROBERTSON, C.J.

In this case the complainants have appealed from the decree of the circuit judge dismissing their bill in a suit for an injunction to restrain the prosecution of an action of ejectment. This court has heretofore reversed a decree sustaining the demurrer to the bill, the allegations of which were summarized in the former opinion. Ante, p. 123. The demurrer having been overruled, the respondent answered and a hearing was had. The circuit judge filed a written opinion in which, after reviewing the evidence, he said, "Repeated reviews of the testimony in this case have always resulted in the conclusion that the complainants have shown no grounds for relief in equity. The complainant Kanakanui secured from Mrs. Heleluhe the execution of an unconscionable undertaking, taking it from the standpoint of the complainant, but which might well have been considered a loan, as it appears that such was the intent at the time the lease was executed. The complainant Kanakanui determined for himself that he would not pay the taxes, because he did not get possession of a minor portion of the premises covered by the lease and continued to default in the payment of the taxes, acting on his own judgment until he found that difficulty was in store for him. He contends that he was lulled into security by the action of Mrs. Heleluhe, all of which is

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denied by her, and I find that the complainant has not sustained the burden on that point. There is nothing in the complainant's case that appeals to good conscience or equity upon which to relieve against the forfeiture as suggested in the bill." Whatever claims the respondent may have made in the court below based on the proposition that the lease to Kanakanui was given merely as security for a loan of five hundred dollars and that the lessor was entitled to a surrender of the term and cancellation of the instrument upon repayment of said sum, and that otherwise the transaction could be viewed only as an unconscionable one, have been abandoned. The original validity of the lease is now conceded by the respondent, but she contends that upon the evidence the complainants are not entitled to relief against the forfeiture. Certain other questions have also been presented for consideration but it will not be necessary to pass upon them.

The lease from Wakeki Heleluhe to S. M. Kanakanui, Trustee, which was executed on the 12th day of April 1906, demised the two pieces of land described in R. P. 4432, L. C. A. 1447, for the consideration of the sum of five hundred dollars, for the term of twenty years commencing on the 1st day of July 1906, and in it the lessee covenanted to pay the taxes on the land. The lessor reserved the right of re-entry for breach of the covenant. It was alleged in the bill (in substance) that the lessor had admitted her inability to put the lessee into possession of one of the pieces of land, and that thereafter, and in the early part of the year 1907, she asked him why he did not pay the taxes, to which he replied that as he had not been put into possession of all the land he considered that he was not liable for the taxes and that he would not pay them until he should be put into possession, and that she replied, "all right." With reference to this we said (ante, p. 128) "The failure and inability of the lessor to put the lessee into possession of one of the pieces of land demised gave to the lessee a claim against the lessor which, presumably, would amount to an equivalent

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of several years' taxes on the piece that the lessee was put into possession of. The lessor took no steps toward claiming a forfeiture though she was told by the lessee that he considered he was not required to pay the taxes unless he should be put into possession of all the land. This condition continued for four years or more. The lessee was lulled into non-action." The testimony given at the hearing puts this matter in a different light. It appears that the party who was in adverse occupancy of the parcel of land referred to (spoken of as the "mauka piece") did not continue in possession, as was inferred from the bill, until the time the taxes were paid by the respondent, but that he vacated the premises some years ago, and that since then there was nothing to prevent Kanakanui from taking possession, and that Kanakanui was aware of the fact. He testified that the piece had been abandoned three or four years ago and has since been lying idle. Wakeki Heleluhe testified that it was in 1908 that Kanakanui told her that the Chinaman was no longer on the mauka piece. And so it appears that the allegation of the bill above referred to and the further allegation, "that these complainants refrained from paying the said taxes, relying on the agreement aforesaid between said complainant, Samuel M. Kanakanui, Trustee, and Wakeki Heleluhe that he should not pay the taxes on the aforesaid land and premises until he, the said complainant was placed in the possession of all the land and premises so demised to him," have lost their force in the light of the evidence. The fact of the lessee's inability to obtain possession of the one piece of land could not be claimed as an excuse for not paying the taxes since the year 1908. Furthermore, proof of the alleged agreement of Wakeki Heleluhe that Kanakanui should not pay the taxes until he had been put into possession of all the land depended upon the uncorroborated statement of Kanakanui, and the fact was denied by Wakeki Heleluhe.

It appeared in evidence, as it was also alleged in the bill, that on the 20th day of August 1907, Liliuokalani instituted

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an action of ejectment against the complainants herein and Wakeki Heleluhe claiming a portion of the piece of land held by Yee Wo under his lease from Kanakanui. The action was discontinued on April 26, 1911, without having been brought to trial. Kanakanui was allowed to testify at the hearing, over the objection of counsel for the respondent, that Wakeki Heleluhe approved and agreed to his suggestion that in view of the pendency of the ejectment case it would be time enough to attend to the payment of the taxes after the conclusion of that case. Mrs. Heleluhe denied the making of any such agreement. She testified that the only conversation she had had with Kanakanui with respect to the payment of these taxes was on an occasion when there were two years' taxes due; that on reminding Kanakanui of the fact he said "Do I have to pay it?"; that she replied "the lease says that you have to pay it," and that she supposed he had attended to the matter. And thus it appears that proof of the conduct of Wakeki Heleluhe and of the agreements on her part which it was claimed lulled the complainant Kanakanui into security and caused him to refrain from paying the taxes depended wholly upon the testimony of Kanakanui himself; that his testimony was flatly contradicted by that of Mrs. Heleluhe, and that the circuit judge found that the complainants had not sustained the burden of proof as to this part of the case. The point involved is one merely of the credibility of the witnesses and the weight to be given to their testimony. We see no reason for disturbing the finding made by the circuit judge that the complainants had failed to sustain the burden of proof as to these matters. It must be held, therefore, that Kanakanui's failure to fulfil his covenant with reference to the payment of the taxes was wilful and persistent, and that Yee Wo is in no better position than Kanakanui. Under these circumstances, and upon the principles adverted to in our former opinion, equity will not relieve against the forfeiture. Equity will not relieve a lessee from a forfeiture of condition where the breach has been wilful and

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persistent and was not induced by any act of the lessor. The respondent paid the taxes on July 24, 1911, and after the payment she was not bound to accept the amount of them from the complainants.

It appeared in evidence that some time between May and July 1911 Mrs. Heleluhe offered to pay Kanakanui the sum of five hundred dollars. The object of the offer was not made clear by the testimony, but whether, as we understand counsel for the complainants to contend, it was offered as a consideration for a surrender by Kanakanui of the lease; or whether it was made pursuant to the idea which Mrs. Heleluhe seems to have entertained that the lease might be terminated by her at any time upon the payment of that sum, we think there is nothing in the circumstance that could affect the rights of either party.

The complainants claim that they should not be held liable for costs because they have been ready to make good the amount of the taxes ever since the payment of them by the respondent. There is no merit in the contention. At the hearing numerous objections were raised by complainants' counsel to rulings made as to the admission and rejection of evidence but they have not been urged in this court and we regard them as having been abandoned.

The decree appealed from is affirmed.

W. A. Greenwell and *E. C. Peters* (*Castle & Withington* with them on the brief) for complainants.

Eugene Murphy (*Lorrin Andrews* with him on the brief) for respondent.

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PANG CHEW v. WILLIAM HASKINS KEALAKAI, NA-HOLOAA KEALAKAI, SIU LEONG, SIU KIN KEE, WONG MOO YAN, KIN KEE, AND YEE YAP, TRUSTEE FOR CHUN TONG.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED DECEMBER 9, 1912.

DECIDED DECEMBER 16, 1912.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

USURY—transaction not usurious.

There being no evidence of any benefit or advantage exacted by the lender from the borrower in addition to the agreed rate of interest of twelve per cent. per annum, the transaction is not usurious.

LANDLORD AND TENANT—taxes on improvements.

Where a lease requires that the lessee pay the taxes on the improvements made or erected on the land, the lessee is not liable for taxes on increased value due to the filling in of the land.

OPINION OF THE COURT BY DE BOLT, J.

This is an appeal by the respondents, W. H. Kealakai and Naholoaa Kealakai, from a decree entered in favor of the complainant, Pang Chew, for the sum of \$850 with interest from October 14, 1909, at the rate of twelve per cent. per annum upon a promissory note given by the respondents to the complainant, and decreeing a foreclosure of the mortgage executed to secure the payment of the note and sale of the land therein described to satisfy the complainant's claim. The other respondents being tenants on the land were, for that reason, made parties to the suit, but they did not answer or make any appearance in the case. The suit was brought to foreclose the mortgage for default in payment of both principal and interest. The facts thus briefly alluded to constitute, in substance, the essential averments of the bill filed by the complainant.

The two respondents appearing in the case, by their answer

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(after alleging that they understood that they were borrowing the \$850 from one Akai, that they promised to pay him the sum of \$400 as interest, and that they had no knowledge of having executed the note and mortgage sued upon), "neither admit nor deny the allegations" of the bill, but leave the complainant "to his proof thereof." The respondent, W. H. Kealakai, also interposed a so-called counter-claim, setting forth two grounds of defense, namely: (1) That the transaction was usurious, the complainant, as it is claimed, having exacted interest in excess of the rate of twelve per cent. per annum, cannot now recover any interest; (2) that the complainant is indebted to this respondent upon a counter-claim in the sum of \$252.87, with interest, for money paid by the respondent as taxes on improvements made on the land described in the mortgage, the complainant as tenant being under obligation to pay the taxes upon all "improvements made and erected on the land" failed to pay such taxes.

1. As to the question of usury. In support of the contention that the transaction involving the making of the loan was usurious, it is urged that the evidence shows that Akai was the agent of the complainant, and as such agent, and with the knowledge and approval of the complainant, exacted of and required the respondents to pay to him the sum of \$95 as a bonus for making the loan; and that the complainant was also to have in addition to the interest stipulated in the note and mortgage the use of the land in question, which he was then occupying as tenant, two years free of rent, which use was equivalent to the sum of \$100. The evidence, however, does not support this contention. On the contrary, when all the evidence is considered together and in the light of the facts and circumstances disclosed by the record, it is clear that Akai was acting as the agent of the respondents and not as the agent of the complainant; that the respondents agreed to pay and did pay Akai the sum of \$95 for his services in obtaining the loan for them; that

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the complainant not only did not receive the \$95, nor any part thereof, but that he did not know that Akai had exacted or had received any compensation in the transaction from the respondents. The contention that the complainant was also to have the use of the land for two years free of rent as a consideration for making the loan is without merit. It appears that in 1899 the respondents leased the land in question to one Pang Fong for twenty years at \$50 per year, and that in consideration of the payment of \$500 of the rent in advance the lessee was to have the use of the land two years free of rent. The lease was afterwards assigned to the complainant. The loan by the complainant to the respondents was made in 1909. We are unable to perceive any connection between these transactions, separated as they are by a period of ten years. The lease was to Pang Fong and the loan from Pang Chew.

2. As to the counter-claim. The lease referred to required the lessee to pay the taxes on the "improvements made or erected on the land." The tenants, including the complainant, have paid the taxes on the buildings and other structures erected on the land. The land, however, being low was filled in with earth which enhanced its value. There was also an increase in value in common with other property in that vicinity not due to the filling in. The respondents contend that the complainant, under the terms of the lease, is also liable for the taxes on the increased value of the land caused by the filling in. We do not so construe the lease. The term "improvements," as used in the lease, obviously relates to buildings and other structures erected on the land and not to the filling in of the land. Assuming, however, that the complainant is liable for the taxes, as claimed, there is no evidence tending to show what proportion of the increase in value of the land is due to the filling in as distinguished from the increase in value in common with other property in that vicinity. The burden of showing the exact amount of this increase in value due solely to the filling in was

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upon the respondents. They failed to show this. Hence, there is no basis upon which the amount of the taxes can be determined.

We therefore conclude that the transaction as to the loan was not usurious and that the so-called counter-claim is without merit.

The decree is affirmed.

Lorrin Andrews and Eugene Murphy for complainant.

C. F. Peterson for W. H. Kealakai and Naholoaa Kealakai.

HAWI MILL & PLANTATION COMPANY, LIMITED, v.
R. T. FORREST, TAX ASSESSOR.

HIND PLANTATION COMPANY, LIMITED, v. R. T.
FORREST, TAX ASSESSOR.

HIND ESTATE (JOHN HIND, TRUSTEE,) v. R. T.
FORREST, TAX ASSESSOR.

APPEALS FROM TAX APPEAL COURT, THIRD JUDICIAL CIRCUIT.

ARGUED DECEMBER 6, 1912.

DECIDED DECEMBER 20, 1912.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

TAXATION—weight of decision of tax appeal court.

In the supreme court a tax appeal occupies about the same position as an equity appeal. The presumption is that the decision appealed from is correct and the burden is upon the appellant to show wherein it is erroneous. Where most of the evidence is documentary, and comparatively little depends upon the credibility of witnesses the presumption may be more readily overcome than it would be in a case turning largely on the weight of testimony.

Hawi Mill & Plantation Co. v. Forrest, 21 Haw. 389.

SAME—*valuation reduced when too high.*

The assessment of the property of Hawi Mill & Plantation Co., Ltd., as of January 1, 1912, by the tax appeal court at \$1,200,000 held, upon the evidence, too high, and reduced to \$1,100,000.

OPINION OF THE COURT BY ROBERTSON, C.J.

These appeals were brought by the taxpayer in each case from decisions of the tax appeal court of the third judicial circuit.

In the case of Hawi Mill & Plantation Co., Ltd., the company returned the aggregate value of its combined property as the basis of an enterprise for profit as of January 1, 1912, at the sum of \$700,000. The tax assessor assessed the property at \$1,300,000 and the tax appeal court fixed the valuation at \$1,200,000. From the decision of that court the company appealed as to so much of the assessment as exceeded the sum of \$800,000.

The argument of the case involved the question as to what weight should be given the decision of the tax appeal court, and counsel for the assessor point out that as such courts are usually comprised of business men living in the district in which the property is situated, and who have actual knowledge of the property, considerable weight ought to be accorded to their findings. In support of the contention that the burden is upon the appellant to show that the decision appealed from was erroneous, and that the valuation fixed by the tax appeal court will not be changed if it appears to be fair and just and was not based on a wrong theory or defective data, are cited the cases of *Tax Assessment Appeals*, 11 Haw. 235; *Tax Assessor v. Wilder*, 17 Haw. 425; *Tax Assessor v. Wailuku Sugar Co.*, 18 Haw. 422; and *In re Taxes Makee Sugar Co.*, 19 Haw. 331. In the first case cited it was said that "A tax appeal occupies about the same position as an equity appeal in this court," and reference was made to the case of *Cha Fook v. Lau Piu*, 10 Haw. 308, wherein it was said (p. 312) that "while great weight has always been given to the findings of fact of the judge who first heard the case, and this should be so, because he has seen and heard the

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witnesses, this court has also felt at liberty to review carefully all the evidence sent up in appeal cases, and to form such conclusions upon them as seems proper." We think the language used in 18 Haw. 422, 424, was not intended to lay down a different rule than that which likened tax appeals to equity appeals. In cases turning wholly or largely on the credibility of witnesses, or on an inspection of the property, more weight naturally would be given the findings of the court below than where the evidence is mostly documentary or consists principally of tables of figures and estimates. In the case at bar, except as to the testimony relating to the values of the several items of property which go towards making up the basis of the enterprise for profit, the evidence consists almost wholly of documents, statements and tables of figures. The presumption is that the decision appealed from was correct, and the burden is upon the appellant to point out wherein it was wrong, but the presumption in a case such as this may be more readily overcome than in cases depending to a greater extent on the credibility of witnesses and the weight of testimony.

In 1897 the Hawi plantation, then owned by Mr. R. R. Hind, was assessed at the sum of \$285,500. (11 Haw. 252.) The report of the case shows, among other things, that there were 1457 acres of cane land which gave an average yield of 2.55 tons of sugar per acre, and nearly one-half of which was held under lease; that in seven years the output varied from 1250 to 2881 tons; and that the annual profits over a number of years varied from \$35,000 to \$88,941. In 1900 this property was valued at \$265,000 upon a showing that the yield for 1899 had fallen to 1 1/5 tons of sugar per acre; that there would be no profit but a possible loss on the year's business; that the rainfall in the district was decreasing each year; that irrigation by pumping was an experiment, and that the additional lands were leaseholds held at high rental, and that it was problematical whether they would be a source of profit or loss to the plantation. The present company was incorporated in 1904 with a

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paid up capital of \$300,000. The stock is held by the family of the late R. R. Hind and there have been no sales of shares. The deputy assessor valued the separate items of property comprising the plantation at the aggregate sum of \$1,120,441.55, while the company's manager valued the same at \$606,289.55. The decision of the tax appeal court discloses no express finding on this point, but a fair valuation of the property based upon the separate appraisal of the different items would probably be somewhere between the totals given by the two witnesses. But the assessment of the combined property as the basis of an enterprise for profit requires that there be taken into account all facts and considerations which reasonably and fairly bear upon the value of the property as a whole including the gross receipts, running expenses and net profits of the enterprise.

The evidence shows that the company holds about 6121 acres of land; in fee simple, about 997 acres of which about 847 acres are cane land and the rest pasture; under lease from the Hind Plantation Co., Ltd. (which is controlled by the stockholders of the Hawi M. & P. Co.), 965 acres; under government leases 2099 acres, of which 1516 acres are subject to the homesteading withdrawal clause; under leases from other parties 1828 acres; and some small parcels belonging to the Hind Estate, for which no rental is charged, aggregating 234 acres. The government has notified the company of the proposed withdrawal and cancellation of two leases covering about 927 acres of land which is to be homesteaded. These are among the less desirable lands of the company. Whether the whole of this area has been under cultivation was not made clear, but there was evidence to the effect that the land is fit only for planting in cane so that if it should be so planted the company would be in a position to contract with the homesteaders for the grinding of their cane. The company now grinds the cane of an adjoining plantation and as consideration receives twenty-five per cent. of the sugar manufactured. The extent of the probable loss which may accrue to the company by reason of the cancellation

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of those leases it is difficult to estimate upon the evidence now before us. In 1911 there were 396 acres of cane land not cultivated, and this year, 784 acres. It appears that since the incorporation of the company an irrigation ditch has been constructed, from which a supply of water is obtained, and the increased yields of the plantation are doubtless due to some extent to the improved water supply. The testimony shows that 1569 acres of land in cultivation for the 1912 crop were being irrigated. The company has superior shipping facilities, owning its own landing whereby it is enabled to receive supplies from and put its sugar into deep-water vessels.

The following table shows that the output of the plantation has steadily increased; that the cost of production also has increased; that the market prices of raw sugar have been favorable; and that the profits, the net result of the conflicting factors, have been large.

Year.	Culti- vated Area. Acres.	Crop. Area. Acres.	Crop. Tons.	Cost of Produc- tion. Tons.	World's Average Price per lb.	Net Profits .	Dividends.
1905	.....	.....	3687	.....	4.278	\$ 87,809	\$180,000*
1906	.....	.....	4957	.....	3.686	148,000	30,000
1907	.....	.....	5270	.. .....	3.756	163,303	60,000
1908	2764	1620	6611	\$35.55	4.073	303,137	90,000
1909	2929	1616	6258	42.35	4.007	177,849	75,000
1910	3196	1587	7202	46.304	4.188	201,864	30,000
1911	3155	1762	7480	46.939	4.453	298,190	75,000

* Included other realizations than plantation profits.

The above figures would indicate that this property during the past few years has been under assessed. The assessment of January 1st 1911 was \$800,000. The apparently conservative estimate of the company's manager of the output for 1912 was 7211 tons. The profits over and above the amount paid out in dividends have been put partly into permanent improvements and partly invested in other enterprises. The cor-

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poration exhibit for 1911 shows among the assets of the company as of December 31, 1911, "Stocks and holdings in other companies, \$524,808.07," and "Credit with agents, \$280,696.78." The average annual net profits for seven years were \$197,164. The probabilities, so far as they can be judged, are against such favorable results in the coming years, and we think that the valuation of the tax appeal court was too high. Considering all the circumstances, those which make against the future prospects of this plantation as well as those which tend to a favorable outlook, we think a conservative valuation of the property would be \$1,100,000. Upon the capitalization of profits basis this is at the rate of about 18 per cent., and that, considering the situation and prospects of the plantation, would seem to be fair and reasonable. The assessment is therefore fixed at \$1,100,000.

As to the appeal of Hind Plantation Company, Limited. This company owns 965.82 acres of cane land in fee simple which it leases to the Hawi Mill & Plantation Company at the annual rental of \$3600. It returned this land at the valuation of \$17,000; it was assessed at \$43,000; and the tax appeal court sustained the assessment. The land is worth more than eight times the annual rental. The valuation of less than forty-five dollars per acre for this land would seem not to be too high, and we find nothing in the record to overcome the presumption that the decision appealed from was correct. The decision is affirmed.

Hind Estate (John Hind, Trustee). In this case there were 234.24 acres of land, consisting principally of small remnants, returned at \$1200, assessed at \$3875, and the assessment was sustained by the court below. The assessment was at the rate of less than seventeen dollars an acre. What we have said in the Hind Plantation Company case is applicable here. The decision of the tax appeal court is affirmed.

J. Lightfoot for appellants.

A. A. Wilder (Thompson, Wilder, Watson & Lymer on the brief) for appellee.

Chung Nung v. Territory, 21 Haw. 395.

CHUNG NUNG v. TERRITORY OF HAWAII.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

ARGUED JANUARY 3, 1913.

DECIDED JANUARY 11, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

TRIAL—charge of court to jury—stenographer's notes—transcript.

Where an official stenographer is present and taking notes of the charge of the court to the jury, it is not necessary for the court to reduce its charge to writing, but such charge may be given orally, and noted by the stenographer. Failure of the stenographer to transcribe such charge and file the same within the statutory time will not, in the absence of prejudice, entitle a party, as a matter of right, to a new trial.

OPINION OF THE COURT BY DE BOLT, J.

This is a writ of error to the circuit court of the first circuit, sued out by Chung Nung, the plaintiff in error, to review a judgment and sentence of imprisonment rendered against him as defendant in the case of the *Territory of Hawaii v. Chung Nung*, wherein he was indicted, tried and convicted of the crime of carnal abuse of a female child under the age of twelve years, and sentenced to imprisonment for life at hard labor. Ante 66, 214.

The assignments of error are, that the trial court did not reduce to writing and read its charge to the jury as required by section 1799, R. L., and that the official stenographer did not transcribe such charge and file the same within one week thereafter pursuant to the requirements of section 1800, R. L.

It appears from the record that the charge of the court as given consisted of certain written requests made and filed by counsel for Chung Nung, some of which requests were refused and some were modified, and that the judge wrote on the margin of each request either the word "refused" or the word "given" or the words "given as modified," with the initials of the judge, W. J. R., under each, except two which were not initialed, so

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that it distinctly appears what requests were given and what refused, in whole or in part, and that no other charge was given, except as to the selection of a foreman of the jury, the date, form and signing of the verdict, and that the verdict "must be unanimous." It also appears that the official stenographer was present taking notes of the charge as given, and that his notes were transcribed and filed in the cause, although not within the prescribed time.

There was no contention when the case was before us on exceptions (ante 214), nor is there any contention now, that the trial court committed any error in the refusal or modification of any of the written requests to charge, or that the charge as given did not correctly state the law applicable to the facts.

Section 1799, R. L., reads: "Unless the parties to the cause on trial either in person or through their attorneys, shall file therein their written consent that the court may charge the jury orally, it shall be the duty of the court, except as provided in the next succeeding section, to reduce to writing and read its charge to the jury; and the manuscript of such charge, signed by the court, shall be filed in the cause, and shall constitute a part of the record thereof. Whenever, and as often as the court shall depart from such duty, either party to such suit shall be entitled, as a matter of right, to demand and have granted a new trial of such cause."

Section 1800, R. L., so far as it is pertinent, reads: "In cases where an official stenographer is present, and taking notes of the trial proceedings, it shall not be necessary for the court to reduce its charge to writing, but such charge may be given orally, and noted by such stenographer. It shall be the duty of the stenographer in such case to transcribe his notes of such charge within one week thereafter, and file the same, duly certified in said cause, and such transcript may thereafter be used and referred to in like manner as though the same had been written, charged and filed by the court, as provided in the last preceding section. * * *"

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The plaintiff in error contends that the record does not show that the charge of the court to the jury was in writing, nor that he consented to the giving of such charge orally, nor that such charge was transcribed and filed by the official stenographer within one week thereafter, and that, therefore, he is entitled, as a matter of right, to a new trial. Otherwise stated, the contentions are, that the court, without the consent of the plaintiff in error, charged the jury orally, and that such charge was not transcribed and filed within the statutory time.

This court judicially knows that official stenographers are appointed by the circuit court of the first circuit to attend its sessions, and the presumption is, nothing to the contrary appearing, that at the time the court charged the jury, an official stenographer was present in his official capacity and performing his duty. Moreover, as already observed, the record shows that he was present and taking notes of the charge as given by the court. Hence, the purpose of the statute, namely, that the charge of the court shall be preserved in tangible and permanent form, and not rest merely in the memory of man, was complied with.

The contention that the plaintiff in error is also entitled, as a matter of right, to a new trial merely because the stenographer failed to transcribe and file the charge of the court within the prescribed time, is without merit. The provisions of section 1799, which entitle a party, as a matter of right, to a new trial for failure of duty on the part of the court to charge the jury as therein directed, has no application where the stenographer fails to transcribe and file the charge of the court as required by section 1800. That the legislature only intended that a new trial should be granted, as a matter of right, for a failure of duty on the part of the court to observe the requirements of section 1799, and not for a mere failure of duty on the part of the stenographer to observe the requirements of section 1800, is obvious. See *Territory v. Maga*, 19 Haw. 157. That the charge of the court, in the absence of the consent of the parties,

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should be preserved in some tangible and permanent form was doubtless deemed by the legislature of much greater importance than the mere transcribing of such charge by the stenographer.

The plaintiff in error relies upon *Hopt v. Utah*, 114 U. S. 488. That case is clearly distinguishable from the case at bar. The Utah statute, upon which the *Hopt* case is based, provides that the charge of the court to the jury "must be reduced to writing before it is given, unless by mutual consent of the parties it is given orally," and that the clerk within five days after judgment upon a conviction must annex and file the papers necessary to constitute the record, including "* * * 7. The written charges asked of the court and refused, if there be any; 8. A copy of all charges given and of the indorsements thereon." The Utah statute, it will be observed, does not contain a provision such as our statute contains, namely, "In cases where an official stenographer is present, and taking notes of the trial proceedings, it shall not be necessary for the court to reduce its charge to writing, but such charge may be given orally, and noted by such stenographer." Moreover, as far as the consequences of a failure of duty to observe the requirements of the respective statutory provisions is concerned, the distinction above noted between the two provisions of our statute does not exist between the two provisions of the Utah statute.

Whether the charge as given was a compliance with that part of section 1799, which requires "the manuscript of such charge" to be "signed by the court," or whether it was a compliance with that part of section 1802, R. L., which requires the court to write in the margin of the requests to charge the word "given" if approved, or the word "refused" if disapproved, we need not say. The charge, however, as given and noted by the stenographer was sufficient as an oral charge and was not erroneous.

Finding no error in the record the judgment of the circuit court is affirmed.

Lorin Andrews for plaintiff in error.

J. W. Cathcart, City and County Attorney, for the Territory.

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WALTER E. WALL v. HERMAN FOCKE.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED JANUARY 2, 1913.

DECIDED JANUARY 11, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

TENANCY IN COMMON—services of co-tenant—right to compensation.

Tenants in common are not entitled to charge for services rendered in the sale of the common property, unless there has been a special agreement or a mutual understanding to that effect. The mutual understanding of the parties may be proved by the facts and circumstances of the case, and, though it may not be shown that any specific amount had been agreed upon as compensation, yet, if it clearly appears to the satisfaction of the court that compensation for the services to be rendered was to be made, the law will imply an obligation to pay a reasonable amount.

Id.—implied agreement for compensation—evidence.

The mere fact that a co-tenant is, with the knowledge of the other owners, making efforts to sell the common land and that the sale, if accomplished, will result to the benefit of all the other co-tenants is not sufficient to justify the inference that the more active co-tenant is making the efforts with the expectation of compensation from the others or the inference that the others knew or must have known that he had such expectation.

Id.—obligation to compensate not implied by law.

From the mere fact that a defendant had knowledge of his co-tenant's efforts to procure a purchase of the common land, that he acquiesced in those efforts, which proved successful, and that he was benefited by the sale, the law will not, without reference to the intention of the parties, imply an obligation on defendant's part to pay his co-tenant for the services so rendered.

OPINION OF THE COURT BY PERRY, J.

This is an action of assumpsit for \$2700, upon three counts. The plaintiff and the defendant were tenants in common of a tract of land known as Pilipili, 54 acres in area, the plaintiff having purchased his undivided one-half interest in June, 1903, and the defendant having acquired his interest before that date.

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After unsuccessful efforts on the plaintiff's part to procure an amicable partition both parties were desirous of selling the common property to the best advantage. In the three counts of the declaration it is alleged that "plaintiff and defendant entered into an oral arrangement whereby it was mutually agreed that plaintiff should become the agent or broker of them both for the sale of said Pilipili tract and as such agent or broker should procure a purchaser or purchasers of said land, either as a whole or in such parcels or lots as plaintiff might in his discretion decide to be most advantageous to their mutual interests." It is also alleged that the plaintiff procured a sale of the land with the consent and approval of the defendant for the sum of \$54,000. The first count is on an express promise alleged to have been made by the defendant to pay to the plaintiff for the latter's services in selling the land ten per cent. of all sums received by the defendant from sales of the defendant's interest in the land. The second is to the effect that by reason of the sale the plaintiff is entitled to compensation in a reasonable amount for his services and that \$2700 is a reasonable amount. The third is upon an account stated in the sum of \$2700. The defendant filed an answer of general denial and a counter-claim for \$152.09 for balance of revenue from the land collected by the plaintiff and belonging to the defendant. Trial was had without a jury.

The trial court in its decision made no reference to the third count; there was no evidence in support of it. Lamenting the contradictory nature of the evidence and speaking of the case generally, the court said that it was of the opinion "that the plaintiff has failed to make out his case by that clear preponderance of the evidence which the burden of proof requires." Concerning the first count the court held that it was "from the evidence impossible for the court to say that there was a fair preponderance of evidence showing a contract to pay a ten per cent. commission on the sale of the land." Of the claim in the second count it said, *inter alia*, "There can be no question if a

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person stands by and sees another acting in good faith working in his behalf and gives no intimation that he does not desire such labor done that the law will imply a promise on his part to pay the reasonable value of such labor. Such it does not appear to the court are the facts in this case. During the entire time that plaintiff was dealing with Desky the defendant was absent from the Territory. The undisputed evidence is that the defendant's attorney in fact knew nothing of the transaction until the deal had been practically completed with Desky and the latter had agreed to enter into a contract, whatever it was, either of sale or to sell. The plaintiff and defendant were co-owners of the land in question and whatever advantage the defendant obtained by the endeavors of the plaintiff the plaintiff obtained an equal advantage. Under such circumstances it seems apparent that it cannot be said as a matter of law that the plaintiff was working for the defendant rather than himself or that the defendant stood by or encouraged him to work in his behalf. It cannot be doubted that the labors of plaintiff did benefit the defendant, but it seems clear to the court that such benefit was incident to the benefit sought for himself and that therefore no case arises where in good conscience the defendant is bound to pay the plaintiff." Judgment was thereupon ordered and entered for the defendant for the amount of the counter-claim. Subsequently the plaintiff filed a motion for a new trial upon the grounds that the decision and judgment were "contrary to the law, to the evidence and to the weight of the evidence" and that the court erred "in finding that no contract for the sale of the property in question was entered into by plaintiff and defendant" and "in finding that said plaintiff was not entitled to account for his services under the *quantum meruit* count", and upon the further ground of errors alleged to have occurred in the admission and rejection of evidence. The motion was granted and a new trial ordered.

In its written opinion on the motion the court, after reciting that it had held "on the hearing of the case in chief that the

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plaintiff had not shown by a preponderance of the evidence that defendant had entered into a contract with him to pay plaintiff for his services in selling a certain land held by them in common" and "that plaintiff was not entitled to judgment under his count for *quantum meruit*," said: "There can be no doubt that defendant did know that plaintiff was using effort and time in the sale of the common land, and that defendant acquiesced in such effort and expenditure of time. Nor can it be doubted that defendant was benefited by the sale of the land, nor that the sale was consummated by the efforts of Wall, the plaintiff, alone. Under such circumstances, I am of the opinion that the efforts of plaintiff were not in contemplation of joint or common tenancy, were without his duties as co-tenant of the defendant, and being acquiesced in by the defendant and the defendant having been benefited thereby, and that therefore the plaintiff is entitled to judgment on his count of *quantum meruit*." The case comes to this court on the defendant's exceptions.

The essence of the action is a claim by one person against his co-tenant for compensation for services rendered in effecting a sale of the land held in common. The law relating to compensation of a co-tenant for individual services rendered in the management and care of the common property is well settled. A clear statement of it is found in *Ranstead v. Ranstead*, 22 Atl. (Md.) 405, 406, as follows: "It is certainly a well established principle that joint or common owners are not entitled to charge for services rendered in the care and management of the common property, except where there has been a special agreement or a mutual understanding to that effect; and courts are not disposed to extend such agreements beyond their plain and reasonable import. * * * But the mutual understanding of the parties may be proved by the facts and circumstances of the case, and, though it may not be shown that any specific amount had been agreed upon as compensation, yet, if it clearly appears to the satisfaction of the court that com-

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pensation for the services to be rendered was to be made and services to be rendered with reference to such understanding, the law will imply an obligation to pay a reasonable amount." "Each joint owner, in taking care of the joint property, is taking care of his own interest and the law never undertakes to measure and settle, between partners, their various and unequal services bestowed on the joint business. This must be left to be regulated by contract." *Franklin v. Robinson*, 1 Johns. Ch. 157, 164. "If an agreement that the partner shall be paid for his services can be fairly and justly implied from the course of business between the co-partners, he is entitled to recover. The question is one of evidence, or contract, and whether the right to recover is established by necessary implication or from express stipulation, the rule is the same." *Levi v. Karrick*, 13 Ia. 344, 350. To the same effect are: *Freeman*, Co-Tenancy and Partition, Sec. 260; 17 Am. & Eng. Ency. Law 688; 38 Cyc. 53, 54; *Gay v. Berkey*, 137 Mich. 658; *Cole v. Cole*, 108 N. Y. Supp. 124; *Lake v. Perry*, 54 So. (Miss.) 945. Upon principle the same rule applies when the services rendered consist of efforts to sell common property. Each owner in attempting to bring about an advantageous sale of the whole property is primarily taking care of his own interest and only incidentally benefiting his co-owner. Ordinarily a sale of the whole property will result more advantageously to each of the owners than will the sale of a mere undivided interest and for this reason a co-tenant may well endeavor to procure a purchaser of the whole with the hope that his co-owners will join in the sale. The law does not, in the absence of contract, undertake to measure between co-owners their various and unequal services bestowed on the business of selling their common land. The mere fact that a co-tenant is, with the knowledge of the other owners, making efforts to sell the common land and that the sale, if accomplished, will result to the benefit of all the other co-tenants is not sufficient to justify the inference that the more active co-tenant is making the

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efforts with the expectation of compensation from the others or the inference that the others knew or must have known that he had such expectation.

In this connection it is well to bear in mind the distinction between express contracts, implied contracts and constructive contracts. The first are, as the term implies, those in which "the terms of the agreement are openly uttered and avowed at the time of the making." 2 Blackstone Com. 443. Constructive contracts are "fictions of law adapted to enforce legal duties by actions of contract where no proper contract exists, express or implied." *Hertzog v. Hertzog*, 29 Pa. St. 465, 468. In these the actual intention of the promisor is disregarded. "Implied contracts arise under circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intention to contract." (Ib. 468). "An implied contract, in the proper sense, is where the intention of the parties is not expressed, but an agreement in fact, creating an obligation, is implied or presumed from their acts, as in the case where a person performs services for another, who accepts the same, the services not being performed under such circumstances as to show that they were intended to be gratuitous, or where a person performs services for another on request." 9 Cyc. 242. "There is some looseness of thought in supposing that reason and justice ever dictate any contracts between parties or impose such upon them. All true contracts grow out of the intentions of the parties to transactions and are dictated only by their mutual and accordant wills. When this intention is expressed we call the contract an express one, when it is not expressed it may be inferred, implied or presumed from circumstances as really existing and then the contract thus ascertained is called an implied one. * * * The law ordinarily presumes or implies a contract whenever this is necessary to account for other relations found to have existed between the parties. * * * A party who relies upon a contract must prove its existence; and this he does not do by merely proving a

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set of circumstances that can be accounted for by another relation appearing or existing between the parties. * * * Every induction, inference, implication or presumption in reasoning of any kind is a radical conclusion derived from and demanded by certain data or ascertained circumstances. If such circumstances demand the conclusion of a contract to account for them a contract is proved; if not, not." *Hertzog v. Hertzog*, supra. In general there must be evidence that defendant requested plaintiff to render the services or assented to receiving their benefit under circumstances negating any presumption that they would be gratuitous. The evidence usually consists in, first, an express request pertaining to the services, or second, circumstances justifying the inference that plaintiff, in rendering the services expected to be paid, and defendants supposed or had reason to suppose and ought to have supposed that he was expecting pay, and still allowed him to go on in the service without doing anything to disabuse him of this expectation; or third, proof of benefit received, not on an agreement that it was gratuitous and followed by an express promise to pay." *Railway Company v. Gaffney*, 65 Oh. St. 104, 116.

In his first opinion the trial judge found, and there was ample evidence to support the findings, not only against the claim of an express contract for a commission of ten per cent. but also against the claim of an understanding or expectation on the part of both parties that plaintiff would be compensated by defendant in an amount not agreed upon. His findings of fact and his reasoning, above quoted, under the second count, admit of no other interpretation. His conclusion was in effect that the facts disclosed by the evidence were not such as to justify the implication of a contract or mutual understanding or expectation that the plaintiff was to receive compensation from defendant. It may be that in the later decision the statement that "there can be no doubt that the defendant did know that plaintiff was using effort and time in the sale of the common land and that the defendant acquiesced in such effort and ex-

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penditure of time" and that "defendant was benefited by the sale of the land" and that "the sale was secured by the efforts of Wall, the plaintiff, alone" was intended or operates as a modification to that extent of the findings in the earlier opinion. Assuming, but not deciding, that that is so and that the court had the power under the circumstances to alter its findings of fact to that extent, it is clear that the original findings were not altered in any other respect and that in the later opinion all that the court intended to hold was that upon the facts, and those only, stated in the second opinion the plaintiff was, as a matter of law, entitled to compensation. But the four facts relied upon by the trial court, namely, that defendant had knowledge of plaintiff's efforts, that he acquiesced in those efforts, that he was benefited by the sale and that the sale was consummated by the plaintiff alone, are not, under the law above stated, of themselves sufficient to give rise to an obligation on the defendant's part to pay and since the findings that there was no express contract and that no circumstances existed from which a mutual understanding or expectation should be presumed remain unreversed by the trial court the exceptions are sustained and the order granting a new trial is set aside.

W. B. Lymer (Thompson, Wilder, Watson & Lymer on the brief) for plaintiff.

I. M. Stainback (Holmes, Stanley & Olson on the brief) for defendant.

NO. 22. WALTER E. WALL v. HERMAN FOCKE. Exceptions from Circuit Court, First Circuit. Motion to amend opinion. Argued January 20, 1913. Decided January 22, 1913. Robertson, C.J., Perry and De Bolt, JJ. Per Curiam: The opinion of the court upon the defendant's exceptions to the trial court's order granting plaintiff's motion for a new trial concluded with the statement that "the exceptions are sustained and the order granting a new

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trial is set aside." The plaintiff, conceding the correctness of the conclusion that the exceptions should be sustained, now moves that the opinion of the court be amended by striking out the words, "and the order granting a new trial is set aside," the only ground of the motion being that this court "had no jurisdiction or power to incorporate said ten words aforesaid in said opinion, on consideration of exceptions from said order referred to, and inadvertently erred therein." The provision of R. L., §1867, that "when judgment has been entered in any cause in which exceptions have been allowed, the judgment may be vacated by the supreme court without any writ of error as if it had been entered by mistake," would seem to include, by inference, the power to vacate other orders properly brought before the appellate court for review by exceptions. If a judgment may be vacated by this court on exceptions, so also may an order setting aside that judgment be vacated. Even if, however, the provision of §1867 is not susceptible of this inference, §1630 confers the power. Under the latter section "the supreme court shall have power * * * to make and award all such * * * orders and mandates * * * and to do all such other acts and take such other steps as may be necessary to carry into full effect the powers which are or shall be given to it by the laws or for the promotion of justice in matters pending before it." Upon this court clearly rests the power and the duty to determine questions arising upon exceptions duly brought before it and when exceptions to an order granting a new trial are sustained the vacating of the erroneous order is necessary to carry into full effect the sustaining of the exceptions. This court's power on exceptions to set aside judgments, verdicts and orders granting new trials has been long recognized and exercised. The motion to amend is denied.

W. B. Lymer for plaintiff.

I. M. Stainback for defendant.

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M. F. SCOTT AND NETTIE L. SCOTT *v.* KONA DEVELOPMENT COMPANY, LIMITED, A CORPORATION.

EXCEPTIONS FROM CIRCUIT COURT, THIRD CIRCUIT.

ARGUED NOVEMBER 25, 1912.

DECIDED JANUARY 23, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

PARTIES—non-joinder of defendants—waiver.

In the absence of statute the rule is that the non-joinder of a defendant in an action *ex contractu* can be taken advantage of, when the defect is not apparent on the face of the declaration, only by plea in abatement and that when such a plea is not presented an answer of general denial and trial on the merits constitute a waiver of the defect. Section 1736, R. L., does not alter the rule.

ASSUMPSIT, ACTION OF—essentials—proof of breach.

A breach of the promise declared on is of the essence of the action of assumpsit.

ID.—breach of promise—failure of proof.

When in an action of assumpsit the allegation is that the defendant promised to pay a stated sum of money and neglects and refuses to pay the same or any part thereof and the undisputed evidence is that the defendant's promise was to execute certain promissory notes and to deposit them with a trustee as security for the payment of plaintiff's indebtedness to defendant in an unascertained amount and that all the parties agreed that the notes should not be delivered by the trustee to the payees until after the determination, by agreement, by arbitration or by judicial adjudication, of the amount of the plaintiff's indebtedness and that then such only of the notes should be delivered as were not consumed in the payment of that indebtedness, and the undisputed evidence further is that the defendant has performed all of his part of the contract in so far as the same is possible of performance until the due determination of the amount of the plaintiff's indebtedness and that the amount has not been ascertained in any of the methods prescribed, there is an utter failure of proof of the breach, if not of the promise also, and a judgment of nonsuit may properly be entered.

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~~TRIAL—nonsuit—time for motion.~~

A motion for a nonsuit may be granted even though made at the close of all of the evidence in the case, provided only that the defendant's evidence does not cure the defect complained of in the plaintiff's proof.

~~Costs—attorneys' fees in assumpsit.~~

Defendant's attorneys' fees under section 1892, R. L., are not taxable in an action of assumpsit in which judgment of nonsuit is entered for failure of proof.

~~Id.—mileage—witnesses not subpoenaed.~~

Traveling expenses of witnesses not subpoenaed are not taxable as costs.

~~Id.—witnesses' fees—expert witnesses.~~

Sums paid for compensation of expert witnesses beyond ordinary fees authorized by statute for witnesses generally are not taxable as costs under section 1889, R. L., relating to "actual disbursements * * * deemed reasonable by the taxing officer."

OPINION OF THE COURT BY PERRY, J.

This is an action at law, *ex contractu*, for the recovery from the sole defendant of the sum of \$57,026.61. The trial court found that the promise declared on was made by James B. Castle and F. B. McStocker jointly with the defendant and rendered judgment for defendant on the sole ground of "non-joinder of proper parties defendant" and plaintiffs excepted.

The fact, if fact it was, that there were three joint promisors did not appear on the face of the declaration and therefore the defect, if any, could not have been taken advantage of by demurrer; but the objection could have been raised by plea in abatement. No such plea was presented. The defendant filed an answer of general denial and proceeded to trial on the merits, the actual trial occupying a period of ninety-six days, commencing on September 20, 1910, and continuing, with intermissions, until August 16, 1911. Not until the last day of the trial was the contention advanced that there was a non-joinder of parties defendant. The injustice of permitting the defendant to keep the point in reserve and to raise it for the first time at

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the end of the trial is obvious. By its silence the defendant must be held to have waived the objection. The rule is well settled that in the absence of statute the non-joinder of a defendant in an action *ex contractu* can be taken advantage of, when the defect is not apparent on the face of the declaration, only by plea in abatement and that failing such a plea an answer of general denial and trial on the merits constitute a waiver of the defect. "The objection, however," (that plaintiff sued two or more but not all of joint and several obligors) "is not fatal to the merits, but is pleadable in abatement only; and if not so pleaded, it is waived by pleading to the merits. The reason is, that the obligation is still the deed of all the obligors who are sued, though not solely their deed; and therefore there is no variance in point of law, between the deed declared on and that proved. It is still the joint deed of the parties sued, although others have joined in it." *Minor v. Mechanics' Bank*, 1 Pet. 46, 73. "Generally speaking, all joint obligors and other persons bound by covenants, contract, or quasi contract, ought to be made parties to the suit, and the plaintiff may be compelled to join them all, by a plea in abatement for the non-joinder. But such an objection can only be taken advantage of by a plea in abatement; for if one party only is sued, *it is not matter* in bar of the suit, or in arrest of judgment, upon the finding of the jury, *or of variance* in evidence upon the trial." *Gilman v. Rives*, 10 Pet. 298, 299. "In actions of contract, non-joinder of parties jointly liable as defendants can only be taken advantage of by plea in abatement. In this case the right to plead in abatement was lost, by filing an affidavit of merits with an answer in bar." *Leonard v. Speidel*, 104 Mass. 356, 359. "Nor does it matter that the declaration is upon an individual contract. *A joint contract is not at variance with the count.* It is still the undertaking of the defendant in solido; though being with another, he has the right to have that other brought in, but only in the very first stage of the cause, by plea in abatement." *Collins v.*

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Smith, 78 Pa. St. 423, 425, 426. "The objection should have been taken advantage of, if at all, by a plea in abatement. The general rule that the non-joinder of a defendant can be taken advantage of only by plea in abatement, is elementary." *Hyde v. Lawrence*, 49 Vt. 361, 363. "The rule in regard to non-joinder is well settled and has not been questioned since the case of *Rice v. Shute*, 5 Burr. 2611. * * * If the defendant would take advantage of the non-joinder he must do it at the proper time by a plea in abatement." *Merson v. Hobensack*, 22 N. J. L. 372, 379. "It is argued, further, on behalf of the plaintiff in error, that the judgment against him alone, on the joint note of Coe and himself, is erroneous and must be set aside. Although the institution of a suit against Hennessy alone, upon the joint note of Hennessy and Coe, was undoubtedly irregular, yet, we are of the opinion that it is such an irregularity as ought to have been taken advantage of, by plea in abatement, or, perhaps, demurrer under our mode of pleading; and, if not so taken advantage of, must be held to be waived. This is an objection which goes rather to the mode of proceeding, than to the merits of the action." *Hennessy v. Bolles*, 2 Haw. 184, 187. See also *Dayton v. Hopkins*, 10 Haw. 540; *Converse v. Symmes*, 10 Mass. 377; *Prunty v. Mitchell*, 76 Va. 169; *White v. Cushing*, 30 Me. 267; *Lieberman v. Brothers*, 26 Atl. 828; *Bignold v. Carr*, 24 Wash. 413; *Schroder v. Pinch*, 126 Mich. 185; *Armour v. Ward*, 61 Atl. 765; *Allen v. Sewall*, 2 Wend. 327; *Nickerson v. Spindell*, 164 Mass. 25; *Porter v. Leache*, 56 Mich. 40; *Wilson v. McCormick*, 86 Va. 995.

The provision of section 1736 R. L., that under the general issue "the defendant may give in evidence, as a defense to any civil action, any matter of law or fact whatever," does not render the rule above stated inapplicable or ineffective in this jurisdiction. The matter receivable in evidence under this provision must be a defense to the action. That others not named as defendants promised jointly with the defendant does not

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operate in bar and is not a defense for it remains true in spite of their co-promise that the defendant promised as alleged; and for the same reason there is no variance between the pleading and the proof in such a case. The allegation that the defendant promised is proven, even though it further appear that others joined with him in the promise. Cases supra.

Heeia Plantation Co. v. McKeague, 5 Haw. 101, is not an authority to the contrary. In that case the plaintiff, a foreign corporation, sued without alleging its compliance with the law which denied to a foreign corporation the benefit of the laws of the Kingdom unless it should file in the office of the minister of the interior a designation of a person upon whom service of process could be made. The question of the defectiveness of the declaration in this respect was raised by demurrer, the demurrer was sustained and the plaintiff was given leave to amend. The court said, *inter alia*: "In those countries where the common law exists, the rules of special pleading would require that the question, as to the corporate character of the plaintiff, be made by a plea in abatement, since by pleading to the merits, the defendant admits the capacity of the plaintiff to sue. But the plea of the general issue by our statute allows the defendant 'to give in evidence, as a defense to any civil action, any matter of law or fact whatever.' Civil Code, Secs. 1106 and 1107. And under this plea, the plaintiff, on its amended petition, should be required to show its corporate existence and its compliance with the law." To say nothing of other possible methods of distinguishing the case, it may be noted that the question there was whether the plaintiff was one of the class of corporations to which our statute expressly denied the benefit of our laws and more particularly of the right to sue. It may well have been held that the statutory prohibition of the maintenance of an action continued throughout the trial and could be availed of under the general issue, but that ruling is not an authority in support of the contention that in an action such as that at bar, in which the plaintiffs are law-

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fully suing a defendant which is liable to them, the non-joinder of other persons also liable is not waived by failure to plead in abatement and may be presented as a defense under the general issue.

Upon another ground, however, the plaintiffs cannot prevail in this proceeding. The action is *assumpsit*. In the declaration as last amended, after reciting that on July 5, 1905, the plaintiffs jointly owned in North Kona, County of Hawaii, a large area of growing sugar cane, had certain leasehold interests in the lands whereon the cane was growing and were jointly interested in the cane-planting enterprise, that on the day named they entered into an agreement with one F. B. McStocker relating to the making of advances, the transportation of cane and the manufacture of sugar by McStocker and the planting, cultivation and harvesting of cane by the plaintiffs, that by assignment the interest of McStocker in and duties under the agreement passed to and devolved upon the Kona Development Company, the present defendant, and that certain modifications stated were subsequently made by the parties in the agreement of July 5, 1905, and after a recital, further, of advances made by McStocker or his successor to plaintiffs, of the furnishing by the plaintiffs to the defendant of certain cane seed, wood, use of buildings and land, growing cane on land not included in the agreements and other benefits, and of other acts of the parties under their agreements, it is alleged that as a result of negotiations commencing a short time prior to April 30, 1908, and ending on June 8, 1908, the parties entered into an agreement, hereinafter referred to as the contract of April 30, 1908, whereby "plaintiffs bargained to sell and defendant bargained to purchase all of the interest of plaintiffs in said standing and growing cane and leases and leaseholds and other property" and in three certain promissory notes of \$5000 each owned by plaintiffs "for the sum of \$79,565.28"; that in pursuance of the latest agreement plaintiffs transferred to the defendant all of their interest in the cane, leases, promis-

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sory notes and other property mentioned; that "in consideration of said sale and transfer as aforesaid defendant promised to pay plaintiffs jointly the sum of \$79,565.28, said payment to be as of the date of April 30, 1908, provided that out of said sum of \$79,565.28 plaintiffs jointly and severally promised to pay to defendant all sums that might be found to be due from M. F. Scott to said defendant on account of money advanced or material furnished to said M. F. Scott under any or all agreements between said parties pertaining or relating to said cane planting enterprise, the amount of rents that might be found to be due from said M. F. Scott to J. B. Castle on account of rents known as Laloa rents, to said date of April 30, 1908, and the further sum of \$187" being certain interest named; that in the contract of April 30, 1908, "all other agreements by and between the respective parties or by and between defendant and M. F. Scott had been merged"; that the total due from Scott to defendant and payable under the contract of April 30, 1908, is \$19,335.11; and that "of the sum of \$79,565.28 promised by defendant to be paid to plaintiffs as alleged * * * defendant on or about the 22nd day of July, 1908, paid to plaintiffs the sum of \$3,203.56 together with interest on said sum of \$3,203.56 from the date of April 30, 1908, * * * leaving a net balance due and payable to plaintiffs by defendant as of said date of April 30, 1908, after deducting the said sum of \$19,335.11, of the sum of \$57,026.61, which sum, though often requested by plaintiffs to pay, defendant has neglected and refused and still neglects and refuses to pay or any part thereof." The prayer is for judgment for the sum of \$57,026.61 against the said defendant with interest thereon from the 30th day of April, 1908, * * * together with attorneys' commissions and costs."

The fundamental allegations upon which the action is thus made to rest are the promise by the defendant to pay to plaintiffs \$57,026.61 and the breach of that promise. Upon these points the facts as shown by the undisputed evidence, introduced

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by the plaintiffs, were as follows: The agreement of April 30, 1908, was arrived at by correspondence and its terms are as expressed in that correspondence and in a certain instrument in writing dated June 8, 1908; the total purchase price of the cane and other property was agreed "to be divided into three parts, the first part to be 20% of the whole, and each of the other two parts to be 40% of the whole. The first part, 20% to be payable in one year, one part 40%, payable in two years, and the other part 40% payable in 3 years. Promissory notes to be executed therefor, no one note to exceed \$5000 and each and every note to be executed jointly and severally by the Kona Development Co., the Hawaiian Development Co. and the West Hawaii R. R. Co., the payee in one half the notes to be Nettie L. Scott, and in the other half M. F. Scott, and each and every note to be signed by Jas. B. Castle and F. B. Mc-Stockner, either as guarantors or indorsers, at the election of the respective payees." "All of said notes" were "then to be deposited with some trustee whom the payees may select and Jas. B. Castle approve, as security for the payment of any and all sums that may be found due from M. F. Scott to Jas. B. Castle or the Kona Development Co. on account of cane-planting contract, said notes to be applied to the liquidation of said indebtedness in the order of their earlier maturity, and should said indebtedness exceed the total of all notes then the whole indebtedness to be discharged by the whole of said notes." A schedule of the notes to be executed and deposited with the trustee, showing the number, name of payee, term and amount of each note, was attached to and made a part of the instrument of June 8, 1908. That instrument, executed by the plaintiffs, the defendant and others, recites that the plaintiffs have agreed that "William R. Castle of Honolulu shall be the trustee to hold and dispose of the promissory notes" mentioned in the schedule and provides: that the trustee shall release to the payees notes to the amount of any excess of the total of the notes over and above such total sum as may be claimed by the

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makers to be due to them, by M. F. Scott and shall return and surrender to the makers or release to the payees, as the case might be, notes to the amount of any sum as may be agreed upon by the payees to be due by one to the other; that "if within three months after the execution of this agreement, the said M. F. Scott and the said parties of the second part have not mutually agreed upon a full settlement of the sums so in dispute, being sums claimed to be due from said M. F. Scott to said parties of the second part, then the said parties may agree to arbitrate the sums so in dispute; but, if the parties do not agree upon the terms of a submission to arbitration within ten days after the expiration of said three months, then said M. F. Scott may bring such suit or suits, action or actions, as he may deem advisable to settle and determine the amounts so in dispute" and "upon the final adjudication of the arbitrators or court in any such submission, suit or action, then said trustee shall at once dispose of said notes remaining in his hands in the same manner" as earlier in the instrument provided "and thereby terminate this trust"; that "the trustee is not empowered to declare any of said notes in default for non-payment of interest, nor to collect any interest thereon"; that "in case of any delivery of notes by the trustee to either the party of the first part or to the parties of the second part, he shall in each case deliver, as nearly as may be, one-half of the amounts so delivered in notes made payable to said M. F. Scott, and one-half thereof in notes made payable to the said Nettie L. Scott"; that "in case of the delivery of any notes to the parties of the first part, the trustee is hereby authorized and directed to cancel and revoke by appropriate endorsement thereon the words 'subject to the terms and conditions of that certain Trust Agreement by and between the makers, payee and endorsers hereof and W. R. Castle, dated June 8th, 1908'", which words by agreement were to be a part of each note. By still another written instrument, undated, it was agreed that "the agreement now in force by and between the

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parties hereto shall go into effect as of April 30, 1908, on which date the account of the Kona Development Company, Ltd., F. B. McStocker and James B. Castle against M. F. Scott shall be closed and interest thereon ceased to run, and on which date the notes agreed to be given to said M. F. Scott shall be dated and interest begin to run thereon." The notes were duly executed and deposited with the trustee in accordance with the requirements of the contract and subsequently the trustee released to the payees notes in the amount of \$3,203.56, that being the excess of the total of the notes over and above the total of the makers' claims against Scott. The parties were unable to agree upon the amount of Scott's indebtedness and attempts at arbitration failed; and after the expiration of the period of three months and ten days named in the agreement of June 8, 1908, this action was commenced. The Kona Development Company, F. B. McStocker and others brought a bill in equity to restrain the present plaintiff from proceeding in this action, but the temporary injunction issued was later dissolved and its dissolution affirmed on appeal (19 Haw. 585) and no further steps have been taken in the suit in equity. Plaintiff M. F. Scott has instituted no other judicial proceeding to determine the amount of his indebtedness and it remains today undetermined judicially or otherwise.

No citation of authority is required in support of the statement that a breach of the promise declared on is of the essence of the action of assumpsit. Plaintiffs, recognizing this, have alleged a promise to pay money and a breach of that promise. But there has been an utter failure of proof of the breach, if not of the promise also. The only proof is of a promise to execute certain notes and to deposit them with a trustee as security for the payment of Scott's indebtedness and of an agreement by all the parties that the notes shall not be delivered by the trustee to the payees until after the determination, in one of the methods named, of the amount of Scott's indebtedness and that then such only of the notes shall be delivered as are not

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consumed in the payment of that indebtedness. The defendant has performed all of its part of the contract in so far as the same is possible of performance until the due determination of Scott's indebtedness and has committed no breach of any promise made by it. Under these circumstances the action cannot be successfully maintained. It is not only a matter of variance between the pleadings and the evidence but of a failure of proof of an essential allegation. Nor is it a matter of prematurity of action, which perhaps would be capable of waiver, for even after the expiration of the term of the notes the latter cannot, by the express stipulations of the contract of the parties, be delivered, and their payment cannot be required, until after the due determination of the amount of Scott's indebtedness.

The plaintiffs contend that the law announced in the opinion upon the appeal in the equity suit (19 Haw. 585) should be followed and that if followed it will require a decision in favor of the plaintiffs upon the point just discussed. The contention cannot be sustained. The extracts relied upon by the plaintiffs read: "We see no inadequacy of the legal remedy in consequence of its requiring a money judgment while notes are deposited with a trustee to satisfy such judgment if any is made, for it is to be presumed that they would be applied in payment of the judgment precluding an issue of execution"; and, "neither the declaration in the action nor the bill in equity presents any question which requires to be passed upon by a court of equity or which is not cognizable in a court of law." Ordinarily questions concerning the relative jurisdictions of law and equity to determine a controversy arise when a complainant seeks relief in equity and the respondent objects on the ground that the complainant has an adequate remedy at law and therefore none in equity. In the case reported in 19 Haw. 585, the position was the reverse. The present plaintiffs had first sought a remedy at law and the present defendant urged various reasons why it believed that *its* rights would not be

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sufficiently protected at law; and the attention of the court was directed simply to an ascertainment of whether the complainants in equity would be sufficiently protected at law. The statements quoted must be read in the light of that situation. The court in that proceeding for the dissolution or the continuance of the temporary injunction was not asked to consider and did not consider, as a study of the opinion will disclose, whether the present plaintiffs would be able to prove their allegations in the action at law. The court, apparently assuming that the plaintiffs could succeed in their proof, held that the presumption was that the notes deposited with the trustee would be applied in payment of the judgment precluding an issue of execution, that no violation of the trust in that respect was shown to be apprehended, and that therefore the present defendant was not in need of the protection of an injunction. But even if the court had considered the question and had been of the opinion that the plaintiffs could not prove the essential allegations of their action of assumpsit, the maintenance of the action would not have been restrained. The defense of failure of proof would have been held to be available at law. Equity will not enjoin an action at law merely because the plaintiffs will fail in their proof. "Relief will be denied to a party who seeks the aid of a court of equity against pending or threatened proceedings at law, where it appears that the matters relied upon are such as if established would constitute a defense in a law action, and where the complainant's right will be fully protected by a successful defense; that is, where no wrong is threatened beyond the assertion of the legal demand, open as it is to such defense." 16 Cyc. 57. "The plaintiff needs no injunction and is entitled to none. The statements in the bill, which are admitted by the demurrer, show a perfect legal defense to the action of which he prays the court to restrain the prosecution. * * * A court of equity does not issue an injunction to stay proceedings at law where the rights of a party can be fully sustained in a court of

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law." *Fuller v. Cadwell*, 6 Allen 503, 505. To the same effect are: *Ins. Co. v. Bailey*, 13 Wall. 616; *McBride v. Little*, 115 Mass. 308; *Slater v. Schwegler*, 54 Atl. 937; *York v. Murphy*, 91 Me. 320; and *Bulkeley v. Welch*, 31 Conn. 339.

Another contention is that the account involved in the case is of such a nature that it cannot be conveniently and properly adjusted and settled in an action at law and that for this reason, if for no other, the plaintiffs' remedy is in equity. Upon the motion to dissolve the injunction in the equity suit already referred to (19 Haw. 585) this court considered to some extent the question of the intricacy of the accounts, but upon the mere allegations of the bill found difficulty in "saying whether the action involves the taking of accounts too intricate for a jury to pass upon" and therefore preferred "to regard the injunction as properly dissolved on the ground that the bill does not contain averments requisite to sustain a bill for an accounting", remarking that the bill did "not even pray for an accounting" and did not "allege that a balance would be found owing by the defendants to the plaintiffs and that the plaintiffs are ready and willing to pay whatever balance, if any, should be found upon the accounting to be owing by them to defendants." Upon this subject the circuit court in its decision, "in passing, * * * observed, with reference to the supreme court's remark, 19 Haw. 594, * * * that, with all the evidence presented after a trial of ninety-six days, it would certainly be difficult now to say otherwise than that 'the most that a jury could award would be a lump sum, derived from general impressions remaining as the consequence of a trial covering a long period of time and involving a great multitude of items of all kinds,'" quoting *Fenno v. Primrose*, 116 Fed. 49. The developments at the trial, with its testimony covering 5,639 pages of transcript, its mass of exhibits and the numerous items in dispute between the parties, would seem to at least lend considerable color to the remark of the circuit court.

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However that may be, a decision on the question is not essential to a determination of the present exceptions.

In the formal judgment entered in the court below it is recited that the court rendered a decision "finding that there has been failure to join James B. Castle and F. B. McStocker as defendants with the Kona Development Company, Limited, and ordering that judgment should be entered in favor of the defendant on the ground of non-joinder of proper parties defendant" and it is then "ordered, adjudged and decreed that the defendant, the Kona Development Co., Ltd., have judgment against the plaintiffs, M. F. Scott and Nettie L. Scott, on said ground, and for its costs." Whether the judgment, if it had failed to show on its face that it was based on the sole ground of non-joinder, should be affirmed because of the failure of proof of the breach alleged, need not be considered. In view of our conclusion that the ground of non-joinder must be deemed to have been waived and is not now available to the defendant, we think that the judgment in its present form should be set aside and that defendant's motion for a nonsuit should be granted and a judgment of nonsuit entered. A motion for a nonsuit may be granted even though made, as this was, at the close of the case, provided only that the defendant's evidence does not cure the defect complained of in the plaintiffs' proof. *Brown v. Ins. Co.*, 59 N. H. 298; *Cooper v. Waldron*, 50 Me. 80; *White v. Bradley*, 66 Me. 254; *Fort v. Collins*, 21 Wend. 109; *Jansen v. Acker*, 23 Wend. 480.

Plaintiffs excepted to the taxation against them as costs of attorneys' commissions in the sum of \$1,799.56 and of certain items of disbursements for fees of experts and traveling expenses of witnesses. In strictness, perhaps, these questions are not properly before us for determination since the judgment of nonsuit has not yet been entered. We shall, however, briefly state our views upon them in order to render unnecessary further litigation upon these points.

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In *Lowrey v. Baldwin*, 19 Haw. 258, attorneys' commissions were disallowed upon the dismissal of an action of assumpsit for failure to comply with an order to give security for costs. In considering the same statute (R. L., §1892) under which the commissions are now sought to be taxed the court said: "The statute requires attorneys' fees to be paid by the loser in actions of assumpsit 'to be included in the sum for which execution may issue,' and to be 'assessed on the amount of the judgment obtained by the plaintiff' and 'upon the amount sued for if the defendant obtain judgment.' If this means a judgment of the same kind in the plaintiff's case as in the defendant's case it would be a final judgment and not a judgment on a dilatory plea or upon overruling a demurrer, when, according to the practice, the defendant is allowed to answer over. Although the plaintiff is a losing party on the issue made by the plea or demurrer he is not the loser intended by the statute provided the judgment obtained by the defendant is to be of the same kind as that obtained by the plaintiff. We think that the judgments intended by the statute are of the same kind whether for one party or for the other." In the case at bar, likewise, attorneys' commissions are not taxable. While the plaintiffs are the losing parties, they are not the losers intended by the statute. This particular action is, indeed, determined by the judgment, but that judgment is not upon the merits or final in form. The defendant has not "obtained judgment" within the meaning of section 1892, although it has obtained a judgment.

The two items of \$60 each for traveling expenses of the defendant's witnesses McQuaid and McStocker are not taxable against the plaintiffs. These witnesses were not subpoenaed. R. L., §1891, reads: "The pay of witnesses shall be as follows: Every witness subpoenaed and attending upon the trial of any civil cause, in any court of this Territory, shall be paid the sum of one dollar for each day's attendance, and traveling expenses at the rate of ten cents a mile each way. The fees

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of witnesses shall be taxable items in the bill of costs to be paid by the losing party." This statutory provision is exclusive. The only witnesses entitled to be reimbursed for their traveling expenses are those within the class there named, that is to say, those who have been subpoenaed. The language used is in this respect clear and unambiguous. The class cannot be enlarged by construction to include those not subpoenaed. The case of *Makekau v. Kane*, 20 Haw. 203, 214, is not to the contrary. In that case a valid subpoena was issued and the only objection made to the taxation of mileage and witness fees was that the subpoena was served by an officer not authorized by law to serve it. The witness, however, saw fit not to raise the point of possible invalidity of the service and obeyed the subpoena, thus bringing himself within the class named in the statute. Nor does the statute discriminate unjustly between witnesses who are and those who are not subpoenaed. If a witness desires to receive compensation for his attendance and reimbursement of his traveling expenses he may refuse to attend without being summoned by the court.

The item of \$190 for money paid to M. M. Graham, expert witness, including attendance at trial and travel," and that of \$103.50 to "W. J. Dyer, expert witness", were sworn to by one of defendant's attorneys as "actual disbursements, necessarily and reasonably incurred in defense of said cause." Whether the amount paid to the witness Graham for attendance and traveling expenses is recoverable depends upon whether the witness was subpoenaed, a fact not disclosed by the record. The fees paid to the witnesses as experts were for their services in examining books of account and otherwise preparing themselves to give testimony at the trial. The claim is made under the provision of R. L., §1889, under the title of "attorneys' fees", that "all actual disbursements sworn to by an attorney and deemed reasonable by the taxing officer, may be allowed in taxation of costs." This provision is meager and leaves much to the discretion of the court. It is difficult to define, by con-

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struction, all the disbursements intended by the legislature to be taxable. It will suffice to say that in our opinion the items under consideration are not taxable. It is plain that if they were allowed, "the precedent would draw after it the expense of every preparation for trial and open the door to a flood of evil." *Mark v. Buffalo*, 87 N. Y. 184, 189. See also *Faulkner v. Hendry*, 79 Cal. 265.

The other questions argued need not be considered. The exceptions are sustained, the judgment set aside and the cause remanded with directions to grant defendant's motion for a nonsuit and to enter judgment accordingly.

F. W. Milverton (*J. W. Cathcart* with him on the brief) for plaintiffs.

D. L. Withington and *A. L. Castle* (*Castle & Withington* on the brief) for defendant.

NEW YORK LIFE INSURANCE COMPANY v. HENRY
C. HAPAI, DEPUTY INSURANCE COMMISSION-
ER OF THE TERRITORY OF HAWAII.

RESERVED QUESTION FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED JANUARY 27, 1913.

DECIDED FEBRUARY 4, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

TAXATION—*life insurance companies—tax on amount of business done.*

Section 2621 of the Revised Laws, as amended by Act 65 of the Laws of 1911, which imposes upon all life insurance companies doing business in the Territory a tax upon "the gross premiums received from all business done within the Territory during the year ending on the preceding 31st day of December," less certain deductions, requires that in estimating the amount of the tax there shall be included the renewal premiums received during the year upon policies issued prior to the year in question.

New York Life Ins. Co. v. Hapai, 21 Haw. 424.

OPINION OF THE COURT BY ROBERTSON, C.J.

This is an action to recover money paid by the plaintiff to the defendant under protest.

The undisputed facts are that the plaintiff is a New York corporation lawfully doing a life insurance business in this Territory; that upon the demand of the defendant, the deputy insurance commissioner of the Territory, acting in the premises in the absence of the insurance commissioner, the plaintiff paid the sum of \$2807.32, claimed by the defendant as being the sum due from the plaintiff as and for a tax of two per cent. on the gross premiums received from all business done by the plaintiff in the Territory during the year ending December 31, 1911, less return premiums, re-insurance in companies or corporations authorized to do business in this Territory, and operating and business expenses; that the plaintiff made the payment under protest in writing setting forth the grounds of protest, and notified the defendant that it would institute suit to recover the money; that the gross amount of renewal premiums received by the plaintiff upon policies held in this Territory, was \$142,473.67, the gross amount of premiums upon policies issued during the year was \$13,675.54; that the return premiums amounted to \$43,420.39; that the business and operating expenses amounted to \$15,783; and that the tax demanded was upon the sum of the two items of premiums less the amount of the business and operating expenses. It appears that the sum of \$63.34 was paid out by the company for "tontine annuities." The item was not explained and we are unable to say that it belongs within the category of return premiums.

The statute, section 2621 of the Revised Laws, as last amended by Act 65 of the Session Laws of 1911, in-so-far as it is involved here, provides that "All insurance companies or corporations doing business in this Territory must file with the commissioner annually, on or before the first day of June, in

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each year hereafter, a statement under oath, setting forth the amount of gross premiums received by said companies or corporations, during the year ending December 31, next preceding, from all risks located in, and all business done, within this Territory. * * * * and all life insurance companies shall pay to the treasurer, through the insurance commissioner, a tax of two per cent. on the gross premiums received from all business done within this Territory, during the year ending on the preceding 31st day of December, less return premiums, re-insurance in companies or corporations authorized to do business in this Territory, when such re-insurance is placed through or with local agents, and operating and business expenses, which taxes, when paid, shall be in settlement of all demands of any taxes or licenses or fees of every character imposed by the laws of the Territory," with an immaterial exception.

The defendant now concedes that in determining the amount of the tax due from the plaintiff there should be deducted the amount of the return premiums as above stated as well as the business and operating expenses.

The plaintiff's contention is that the words of the statute, "the gross premiums received from all business done," mean premiums received upon new policies issued during the year. And it is argued that if the legislature intended to include the premiums received upon the renewal of policies issued in prior years the words "from all business done" would not have been used because the words "the gross premiums" would have expressed the idea. The contention is, in other words, that the statute imposes the tax upon the amount of the premiums received upon new policies issued during the year, less the deductions specified, which, in this case, would leave nothing due from the plaintiff by way of taxes for the year ending December 31, 1911. But the defendant, among other points, urges that if the legislature had in mind premiums upon new policies only no deduction for return premiums would have been author-

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ized because there are no return premiums upon policies issued within the year. The controversy seems to revolve on the point whether the collecting of renewal premiums upon policies issued prior to the year in question was "business done within this Territory during the year." The statute requires that in arriving at the amount of the tax there must be included "the gross premiums received from all" such business.

In *Metropolitan Life Ins. Co. v. Darenkamp*, 66 S. W. (Ky.) 1125, a city ordinance which required every life, fire, accident, casualty or indemnity insurance company doing business in the city to pay a tax on "premiums received on business done," etc., was held not to include the premiums collected on all outstanding policies. The court said, "The particular phraseology of the ordinance we are asked to construe, 'premiums received on business done' is very obscure, and, if any meaning is to be attached to the words 'on business done' we must conclude that they refer to premiums paid upon new policies issued by the company," and that "If the ordinance did not mean this they should have been omitted altogether." In the ordinance there construed life insurance was coupled with and treated like other forms of insurance of a different character, and there appears to have been no provision for the deduction of return premiums. We think a similar construction ought not to be placed upon our statute. We think that the words "all business done," even if they were unnecessary, very likely were used in order to make it clear that the premiums to be included were not those realized from new business only but from all business done during the year. We believe that the receiving of renewal premiums would generally be regarded as doing business. *Connecticut Mutual Life Ins. Co. v. Spratley*, 172 U. S. 602, 611. And to construe the words "the gross premiums received from all business done" as including renewal premiums received upon policies issued prior to the year last preceding the making of the return is to give to them a reason-

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able and usual signification and one which harmonizes with the context.

The circuit court reserved the question whether, upon the facts stated, the plaintiff is entitled to judgment and, if so, for what sum. We hold that the defendant was entitled to demand from the plaintiff two per cent. on the difference between the amount of the gross premiums (\$156,149.21) and the sum of the return premiums and operating expenses (\$59,203.39) which would be \$1938.91, and, therefore, that the plaintiff is entitled to judgment in the sum of \$868.41.

A. A. Wilder (*Thompson, Wilder, Watson & Lymer* on the brief) for plaintiff.

L. P. Scott, *Deputy Attorney General* (*Wade Warren Thayer, Attorney General*, with him on the brief), for defendant.

JOHN F. COLBURN v. ANTONINO A. LONG.

ERROR TO CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED FEBRUARY 13, 1913.

DECIDED FEBRUARY 18, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

COSTS—reference to master—transcript of evidence.

A master appointed, with the consent of the parties, in a suit in equity for an accounting is entitled to compensation for his services and to an allowance for the cost of a transcript of evidence necessarily and reasonably incurred by him in the performance of his duty. The cost of the transcript may, in such a case, be taxed against the losing party.

OPINION OF THE COURT BY PERRY, J.

This was a suit in equity for an accounting, instituted by the present defendant-in-error against the present plaintiff-in-error.

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Upon stipulation of the parties an interlocutory decree was made ordering that the cause be referred to "a referee to take evidence of and upon and report to the court the transactions and dealings of the parties hereto" concerning the moneys and other property mentioned in the bill of complaint. Hearings were had before the referee on August 24, 25, 28 and 30, 1911, and on June 13, 1912. After August 30, 1911, further hearing was delayed from time to time owing to other engagements of counsel for the respective parties, one of the continuances, for several months, being due to the absence of the attorney for the appellant from the Territory. The parties finally compromised their differences and consented to the entry of a decree declaring the agreed amount of the respondent's indebtedness and ordering that "respondent pay to the said complainant" the sum mentioned "with his and all costs herein named and hereafter to be taxed"; and a final decree was entered accordingly. At the hearing before the referee notes of all of the testimony were taken by a stenographer, the parties from day to day advancing each one-half of the stenographer's compensation for his attendance under an agreement that the taxation of the amounts of these payments await the final result of the suit. Several months after the hearing of August 30, 1911, the referee, at the suggestion of counsel for the complainant and without the assent of counsel for respondent, ordered a transcript of the stenographer's notes of the testimony for his own use in the determination of the issues involved as well as for the use of counsel in the further presentation of the case. Subsequently the sum of \$136.80 for "stenographer's cost of transcript" was taxed against the respondent. The allowance of the item is now assigned as error.

The power of our courts of equity in proper cases, as, for example, in suits for an accounting, to refer issues to a master or referee is undoubted; and, although there is no provision by statute or by rule for the compensation of referees or for allowances for expenditures necessarily and reasonably incurred

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by them in the performance of their duties under the orders of reference, it is equally clear that such a reference carries with it the implication that the master will be entitled to compensation for his services and to reimbursement for expenditures of the nature mentioned. In the case at bar the parties, in consenting to the reference, must be deemed to have had this in contemplation. It could not have been their expectation that the master would contribute gratuitously for their benefit his services or the amount of his necessary and reasonable expenditures.

Upon the motion for taxation of costs evidence was introduced tending to show the circumstances under which the transcript was ordered by the master and also the reasonableness of the stenographer's charge. It appears, by inference at least, from the decision of the trial judge that the latter found that the master in the exercise of a reasonable discretion deemed the transcript necessary to the proper performance of his duties and that the charge for the transcript was a reasonable one. Without reciting the evidence, it will suffice to say that there was evidence sufficient to support each of the findings. "There shall be no reversal on error of any finding depending on the credibility of witnesses or the weight of evidence." R. L., §1872.

The order taxing costs is affirmed.

J. Lightfoot for plaintiff in error.

E. C. Peters for defendant in error.

In re Title of Palmyra Island, 21 Haw. 431.

IN THE MATTER OF THE APPLICATION OF HENRY
E. COOPER TO REGISTER AND CONFIRM HIS
TITLE TO PALMYRA ISLAND.

APPEAL FROM COURT OF LAND REGISTRATION.

ARGUED FEBRUARY 10, 1913.

DECIDED FEBRUARY 18, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

RECORDS—*registration of title to land—nature of proceeding—unassigned dower.*

A proceeding to bring land under the statute providing for the registration of titles partakes of the nature of a suit in equity, and the court of land registration has power to decree in whom the title or any interest, legal or equitable in land is vested, whether in the applicant or in any other person. The court, in the exercise of its powers, will recognize the right and power of a widow over her unassigned dower, and will sustain her contracts in relation thereto, when fairly made, and will also protect the rights of the assignee of such dower.

EQUITY—*amendment of decree by motion.*

A decree, if the right has not been lost by negligence, or by unreasonable delay, may be amended on motion as to mere clerical errors, or by the insertion or striking out of any matter which would have been inserted or omitted as a matter of course if it had been asked for at the hearing as necessary or proper to carry into effect the decision of the court.

OPINION OF THE COURT BY DE BOLT, J.

The applicant, Henry E. Cooper, having filed his application in the court of land registration to register and confirm his title to Palmyra Island, Henry Maui and Joseph K. Clark appeared and filed notice therein to the effect that they claimed a certain interest in the island; that they protested against an unqualified title being registered and confirmed in the applicant; and that it was their intention to contest the application at the hearing.

Upon the hearing being had a decree was entered on October 4, 1912, declaring that the applicant was the owner in fee sim-

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ple of the island, and that his title to the same be registered and confirmed, subject, however, to any of the subsisting incumbrances mentioned in section 2432 of the Revised Laws, "and subject also to the dower interest of Annie Ringer, now held by Henry Maui and Joseph K. Clark, to one-third of the estate of William Ringer, or, in other words, a life interest in an undivided one-ninth of the island."

It appears from the record that William Ringer, deceased, formerly owned an undivided one-third interest in the island, which interest the applicant acquired, subject, however, to the dower interest of Annie Ringer, the widow of the deceased; and that on April 30, 1912, the widow executed a deed to Henry Maui and Joseph K. Clark purporting to convey to them her dower interest in the undivided one-third of the island formerly owned by her husband, which dower interest had not been assigned or set apart to her.

On October 15, 1912, eleven days after the decree was entered, the applicant filed and presented to the court below the following motion: "Now comes the applicant herein and moves that the decree heretofore rendered in this proceeding be amended by striking out the words, 'and subject also to the dower interest of Annie Ringer now held by Henry Maui and Joseph K. Clarke, to one-third of the estate of William Ringer, or, in other words, a life interest in an undivided one-ninth of the island,' and for cause shows as follows: That at the time of the rendition of said decree the said Henry Maui and Joseph K. Clarke had no interest in and to a life interest in an undivided one-ninth of the island, and in fact and law had no interest whatsoever in and to the real estate mentioned in said decree."

The court denied this motion, from which ruling the applicant appealed.

Counsel for the contestants contends that the motion was properly denied for two reasons, (1) "for the reason that the ground of the requested amendment was one which should have

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been urged at the trial and that as it had not been presented at the trial it was too late to come in eleven days after the entry of the decree and ask by motion to have the decree amended so as to accomplish the very point which it had been sought to accomplish by the petition," and (2) for the reason that "an assignee of an unadmeasured dower interest will be protected in equity, and hence in the court of land registration."

The applicant contends that "there was no way in which to reach the situation except by a motion to amend," and "complains of the incumbrance set out in the final decree and certificate and suggests that the same is not warranted by the facts and that it presents an impossible status from a legal standpoint." He further contends that "an unadmeasured right of dower cannot be sold or transferred, and the widow is not a tenant in common with the heir or owner of the fee;" that "the widow's right of dower rests in action only and for that reason she cannot be awarded a life estate in an undivided one-ninth of the island;" and that "the conveyance to Maui and Clark carried with it no title either legal or equitable and they are not entitled to the benefit of the provisions in the decree."

With regard to the contention of the applicant, that "the conveyance to Maui and Clark carried with it no title, legal or equitable," we deem it unnecessary to determine whether the "conveyance" passed the legal title or not. Whatever the legal rights or power, as contradistinguished from the equitable rights or power, of a widow over her unassigned dower interest may be, we need not say. The authorities, however, are practically unanimous that equity recognizes the right and power of a widow over her unassigned dower, and will also protect the rights of the assignee of such dower interest.

Scribner on Dower, after citing and commenting upon numerous cases on this subject, says: "The doctrine of these cases, recognising the power of equity to enforce the contract of a widow for the sale of her dower interest, when fairly made, and to protect the assignee in his rights, seems both reasonable

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and just, and is undoubtedly supported by the weight of authority." 2 Scribner on Dower, 45, 47. See also *Strong v. Clem*, 12 Ind. 37; *Reeves v. Brooks*, 80 Ala. 26; *Robie v. Flanders*, 33 N. H. 524.

The court of land registration has power to "decree in whom the title or any interest, legal or equitable in land is vested, whether in the applicant or in any other person." Act 11, Laws 1909, section 5; *Paahao v. Swinton*, 20 Haw. 355, 357. We held *In re Title of Pa Pelekane*, ante 175, 178, that "A proceeding to bring land under the operation of the law providing for the registration of titles is of the nature of a suit in equity, and the rules of equitable procedure generally apply."

The dower interest in question is an incumbrance which it was proper to make mention of in the decree. Section 2433, R. L.

With regard to the respective interests of the various parties in the island, it is clear that the widow's dower can only be an incumbrance on the undivided one-third which was formerly owned by her husband, and that the other two-thirds are free from such incumbrance. Hence, it was inaccurate for the court to insert in its decree the declaration that the widow's dower was "a life interest in an undivided one-ninth of the island." This declaration for another reason is inaccurate. If standing alone, it might be taken to constitute the assignees of the dower interest tenants in common with the applicant; but it is clear that a dowress is not a tenant in common with the heir or owner of the fee. *Paulo v. Malo*, 4 Haw. 536. The provisions of our statute, however liberal (Sec. 2277, R. L.), do not give the widow all of the rights of a tenant in common. The inaccuracy, however, was obviously inadvertent and may, upon the motion already presented by the applicant, be corrected by the trial court.

A decree, if the right has not been lost by negligence, or by unreasonable delay, may be amended on motion as to mere clerical errors, or by the insertion or striking out of any matter

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which would have been inserted or omitted as a matter of course if it had been asked for at the hearing as necessary or proper to carry into effect the decision of the court. 2 Beach, Mod. Eq. Pr., §§831-851; 16 Cyc. 504; *Clark v. Hall*, 7 Paige 382, 384; *Lawrence v. Cornell*, 4 Johns. Ch. 545. There was no negligence or unreasonable delay on the part of the applicant in the presentation of his motion, and the amendment sought was, in part, permissible by motion.

The motion as presented, it will be observed, extended to matters of substance, but it should have been granted as to the objectionable declaration last above quoted and other appropriate words inserted in lieu thereof so as to make the decree conform to the facts, as well as to the true interests of the respective parties.

The order denying the motion to amend the decree is reversed, and the cause is remanded with directions to the court to amend the decree in conformity with the views herein expressed, and for such further proceedings as may be necessary, not inconsistent with this opinion.

Applicant filed briefs but did not appear personally.

Wade Warren Thayer for contestants.

TRENT TRUST COMPANY, LIMITED, v. F. W. MAC-
FARLANE.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED FEBRUARY 14, 1913.

DECIDED FEBRUARY 24, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

PRINCIPAL AND AGENT—*agent to procure purchaser—procuring cause of sale.*

A broker employed to procure a purchaser for land who finds a prospective purchaser who is able and willing to buy and starts

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negotiations which result in the coming together of the owner and purchaser in the final relation of vendor and vendee will be regarded as the procuring cause of the sale.

SAME—ability of purchaser to perform—deed taken in name of trustee.

The ability of a purchaser to perform is not open to question where a sale has been effected upon the vendor's terms, and it does not affect the broker's right to a commission on the sale that the purchaser borrowed the money with which to pay the purchase price and the deed was taken in the name of a trustee.

SAME—transaction closed through second broker—right to commission on sale.

The broker who was the procuring cause of a sale will not be deprived of his right to a commission because the transaction was closed through a second broker where the principal had taken no steps to terminate the agency before the purchaser had been procured.

OPINION OF THE COURT BY ROBERTSON, C. J.

This is an action of assumpsit to recover the sum of \$125 claimed by the plaintiff to be due from the defendant for broker's commissions upon the sale of a parcel of land belonging to the defendant.

The principal facts, some of which were expressly found by the court below while others were shown by uncontradicted evidence, were as follows: The defendant owned a piece of land in Honolulu for which he had requested the plaintiff, a real estate broker, to find a purchaser; the Clark Farm Company, Limited, in the early part of March 1911, desiring to purchase a site for a factory applied to the plaintiff and was shown the lot in question and found it suitable for the purpose; the price put upon the lot by the defendant was \$2500, cash; the Farm Company, being unable to pay the price in cash offered through the plaintiff to pay the amount in instalments, but the defendant declined the offer; other terms were suggested by the Farm Company which the defendant was inclined to consider favorably but which were not met by the Farm Company and came to nothing; in the meantime the Farm Company asked the plaintiff for financial assistance which would enable it to make the purchase, and upon plaintiff's refusal the Farm Company

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requested the Pinectar Sales Company, Limited, which was under contract to make certain advances to the Farm Company, to advance the money and make the purchase for the Farm Company; thereupon E. A. Berndt, the president of the Pinectar Company, requested another broker to purchase the land on his behalf; the second broker told the defendant that the Trent Trust Company could not make the sale and that it was "all off," and the defendant, relying upon this representation, and because he had heard nothing further from the plaintiff, gave the broker the plaintiff's receipt for the title papers and instructed him to get the papers from the plaintiff; the plaintiff surrendered the papers "under protest;" the defendant explained to the plaintiff his reason for withdrawing the papers; the purchase price was paid by the Pinectar Company or its president through the second broker in the latter part of March and the defendant executed and delivered a quit-claim deed of the property conveying it to E. A. Berndt, "as trustee;" Mr. Berndt testified at the trial that he purchased the land for the Clark Farm Company, and said that the deed was taken in his name as trustee by way of security for the amount advanced until such time as the amount could properly be charged to the account of the Farm Company on the books of the Pinectar Company; the transaction was a continuous one, and the defendant testified that when he executed the deed he understood that he was conveying to the same party, or "crowd," as he put it, as he had been negotiating with, and that it was the consummation of the transaction that had been begun with the plaintiff; in the early part of the following June Berndt handed over his deed to the Farm Company, and upon the request of that company the defendant executed and delivered a warranty deed of the premises to the Farm Company. On other points there was some dispute. A witness for the plaintiff testified that before the title papers were withdrawn from plaintiff's possession, an offer made by the Farm Company to pay \$500 within four days, or on March 20th, and the balance "within a few

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days," had been communicated to the defendant and accepted by him, but this was denied by the defendant. The president of the Farm Company testified that the Pinectar Company was obliged by the terms of its contract to make the advance requested. On the other hand the president of the Pinectar Company testified that there was no obligation to make the advance at that time, and that later when the Farm Company became entitled to the credit he handed over the deed. The contract between the two corporations was not in evidence. The plaintiff's exceptions being to the decision and judgment of the circuit court on the ground that they were contrary to the law and the evidence, nothing in plaintiff's favor can be deduced from the disputed facts. The case was tried without a jury.

The ground upon which the circuit court rested its conclusion is thus stated in its decision: "An agent in order to recover commissions for the sale of the property must show that he procured a customer both ready and able to purchase on the terms prescribed by the seller. Has the plaintiff shown this by a fair preponderance of the evidence? I am of the opinion that it has not. While it is no part of the agent's duty to finance a proposition to consummate a sale, except as a matter of business method, the obligation still remains to find a customer entirely able to perform, and while it is true that Mr. Berndt in making the purchase took the title in his own name, as trustee for the benefit of the Farm Company, and the defendant admitted that he understood that the deed was in a way for the same parties that were introduced by the plaintiff and subsequently executed another deed for the property to the Farm Company these facts which I find from the evidence do not, in my opinion, support the claim of the plaintiff."

There was no express finding on the point whether the defendant had terminated the agency of the plaintiff in the matter. The defendant did not testify that he did terminate it, and whether the withdrawing of the title papers from the plaintiff's possession under the circumstances shown by the testimony

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was evidence upon which a finding of the termination of the agency by the defendant could have been predicated we need not say. The negotiations had proceeded to such a point that a revocation of the plaintiff's agency at the time referred to would not have had the effect of depriving the plaintiff of its right to a commission if it otherwise was entitled thereto.

The principles applicable to a case such as this were stated in *Schnack v. Montano*, 16 Haw. 805, as follows: "A broker is not entitled to commissions unless he procures a purchaser able and willing to buy; when no time is limited either party may in good faith terminate the agency at will; the broker is not entitled to commissions upon a sale effected thereafter through another broker even though to the purchaser introduced by the first broker, or even though the sale is aided more or less by the first broker's previous efforts, provided the principal acts in good faith; but if the broker procures a prospective purchaser he cannot be deprived of his commissions by the termination of his agency by the principal even though the sale is not consummated until afterwards, provided he was the procuring cause of the sale, or if the principal acted in bad faith for the purpose of avoiding payment of the commissions."

Counsel for the plaintiff do not contend that there was any evidence of bad faith on the part of the defendant, but they argue that as the purchaser was introduced by the plaintiff, and the transaction was a continuous one, the plaintiff must be regarded as the procuring cause of the sale, and that as the sale was in fact consummated, though through another broker, the finding that the plaintiff had failed to procure a purchaser who was able and ready to buy was unsupported by any evidence and constituted error of law. Counsel for the defendant maintain that the decision of the circuit court was amply sustained by the evidence.

The efforts of the plaintiff laid the foundation on which the negotiation began, and resulted in the coming together of the owner and the prospective purchaser in the final relation of

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vendor and vendee. The plaintiff, therefore, was the procuring cause of the sale. *Hoadley v. Savings Bank*, 71 Conn. 599; *Hambleton v. Fort*, 58 Neb. 282; *Peckham v. Ashhurst*, 18 R. I. 376. The second broker did nothing toward bringing the parties together, but merely closed the bargain at the direction of the purchaser. The fact that the deed was taken in the name of a trustee does not affect the result. *Williams v. Bishop*, 11 Colo. App. 378, 383. Nor can it make any difference that the purchaser was under the necessity of borrowing the money with which to pay the purchase price. The plaintiff being the procuring cause of the sale, the agency not having been terminated before the purchaser had been procured, the transaction having been a continuous one, and the sale having been perfected upon the terms demanded by the vendor, there is no room for discussion on the point whether the customer procured by the plaintiff was ready, able and willing to buy. The ability of the purchaser to perform was demonstrated by the payment of the purchase price. We think that under the circumstances above enumerated the authorities are without conflict to the effect that the broker will be entitled to his commission.

The cases of *Wylie v. Marine Nat. Bank*, 61 N. Y. 415, and *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, cited in defendant's brief, are readily distinguishable. In the former case the first broker had abandoned his efforts before the buyer and seller had come to terms, and in the latter, the principal had in good faith and with justification terminated the first broker's agency. In the case at bar there was neither an abandonment by the plaintiff nor a revocation of the agency by the defendant, or, at least, not such a revocation as would defeat the claim to the commission.

The exceptions are sustained, and the judgment is vacated.

I. M. Stainback (Holmes, Stanley & Olson on the brief) for plaintiff.

M. F. Prosser (Prosser, Anderson & Marx on the brief) for defendant.

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KAPIOLANI ESTATE, LIMITED, v. MARY H. ATCHERLEY, LYLE A. DICKEY AND EDWARD M. WATSON.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED FEBRUARY 3, 1913.

DECIDED MARCH 3, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, J.J.

STARE DECISIS—*decisions of courts of last resort binding on inferior tribunals.*

The decisions of a court of last resort are binding upon all tribunals inferior to it. Held, accordingly, that a decision made by the supreme court of the United States following the opinion of the supreme court of Hawaii upon a matter of local law is binding upon this court in another case notwithstanding the belief of this court that its former opinion was wrong.

OPINION OF THE COURT BY ROBERTSON, C.J.

(Perry, J., Dissenting in Part).

This is a bill to declare a trust, to direct a conveyance, and for an injunction against the prosecution of an action at law. The defendants appeal from a decree entered granting the relief prayed for.

It will be necessary in order to properly understand the case to refer to the former decision in this case reported in 14 Haw. 651, and to the cases of *Atcherley v. Lewers & Cooke*, 18 Haw. 625, and *In re Lewers & Cooke*, 19 Haw. 47 and 334; and to the report of the same case on appeal, *Lewers & Cooke v. Atcherley*, 222 U. S. 285.

Since this case was last before this court Lyle A. Dickey and Edward M. Watson have been joined as parties defendant, Mrs. Atcherley having executed a deed purporting to convey to them an interest in the land in dispute.

Without repeating in detail the facts and circumstances which led up to the controversy between these parties and have brought it again to the attention of this court it may be well to refer

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to those matters which may properly be regarded as the leading features of this litigation.

In so far as rights of property in land existed and were recognized in these Islands prior to the establishment of the land commission, the chiefess Kaniu was the owner of the land in dispute when she gave it by oral will, which later was duly proven in court, to her foster son, David Kalakaua, a boy about seven or eight years of age; that by the same will the husband, Kinimaka, was made the testamentary guardian of the child to "take charge" of the land for him; that upon the establishment of the land commission Kinimaka presented a claim in his own right and received an award of this and other land in his own name. On reaching the age of majority Kalakaua, on December 30th, 1856, brought suit in equity against Kinimaka seeking to have the defendant declared to be a trustee for the plaintiff and to compel a conveyance to him of certain lands, including the land in dispute; that Kinimaka died without having filed an answer in the cause; that a new suit was commenced against the widow and minor children (by his second wife) of Kinimaka; this suit was contested by the widow and the duly appointed guardian of the minor defendants, testimony was taken, and the case proceeded to a point where the plaintiff filed a discontinuance except as to the land in dispute and one other piece, it being recited in the discontinuance that the plaintiff, "in consideration of certain sums of money paid by Kinimaka during his lifetime, for his (plaintiff's) use and benefit, relinquishes all right to any and all land now included in the Estate of said Kinimaka, and set forth in the petition in the above entitled cause, and discontinue my action for the same, saving and excepting" two lands; that on the same day a decree was entered in the cause directing Armstrong as guardian of the three children to convey to the plaintiff the two lands referred to; and that the conveyance so directed to be made seems never to have been executed. Had the entry of that decree been followed by the conveyance to Kalakaua of the lands in question

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it is probable that this litigation would not have occurred. Whether Kinimaka took the award of this land in his own name in wilful fraud of the right of his ward or in ignorance of those rights and under the belief of the validity of his own claim probably will never be known, and it is impossible to say at this time whether the decree made by Chief Justice Allen in 1858 was entered pursuant to a compromise entered into by the parties, or whether it resulted from a realization on the part of the guardian of the infant defendants and his counsel of the justness of Kalakaua's claim and an unwillingness on their part to attempt the further maintenance of a position at least morally untenable, whatever might be said of the legal aspect of the affair, or otherwise. The record shows that "Mr. Bates (attorney for Pai and Armstrong) admitted that at the time of making the will the whole property was given to David (Kalakaua), that at the time of her (Kaniu's) death she said to her husband (Kinimaka), standing by at the time, that she wished him to take charge of all her property which she had willed to David." It is quite clear that the entry of a decree in favor of the defendants in the suit of 1858 would have perpetrated an injustice on Kalakaua. To the limited and qualified extent that lands were the subject of private ownership before the creation of the land commission the land in question belonged to Kalakaua; it was his right to apply for an award of title; that right was protected by constitutional guaranty; and it was the duty of his guardian to make application for a title in his behalf; but Kalakaua was deprived of the land without his consent. Perhaps it was supposed that the decree entered by Chief Justice Allen in *Kalakaua v. Pai and Armstrong* in 1858 was self-executing and binding on all the defendants, and that the making of a deed was unnecessary, at any rate the parties in interest acquiesced in the decree, and Kalakaua and those claiming under him remained in undisturbed possession of the premises until Mary H. Atcherley, who had obtained a deed from Moses Kapaakea Kinimaka, brought ejectment against the Ka-

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piolani Estate, Limited, and others on July 31st, 1901. This court (14 Haw. 651) reversed a decree sustaining a demurrer to a bill for an injunction against the maintenance of the ejectment case. It was then held that the decree of 1858 was not ambiguous; that it directed the conveyance to the plaintiff of the minor defendants' interests in the land in dispute; that there was not a lack of jurisdiction over the parties; that the decree was not void for any reason then advanced; that the attack on the decree was a collateral attack; that it was not a consent decree; and that while the court had power to examine into the propriety of the decree it would not, under the circumstances, do so. In the *Lewers & Cooke* case, 18 Haw. 625, this court said that the decree of 1858 "has all the appearances of a compromise decree, consented to by the guardian of minors" (p. 639) but declined to review the ruling made in 14 Haw. 651, that that was not a consent decree, but held that "an additional point not decided in the proceedings on demurrer is decisive against the right of the petitioners to a registered title, which would be substantially an enforcement of the decree of 1858" (18 Haw. 632), the point referred to being that the award of the land commission in favor of Kinimaka, being final and conclusive, was binding on Kalakaua and the decree of 1858 was, therefore, erroneous, if not void. The suit before Chief Justice Allen was regarded as an attack upon the judgment of the land commission, the court saying, "If this court, therefore, shall enforce the decree of 1858, or by registering the title of the petitioner treat the decree as enforceable, it will be the first time in the judicial history of Hawaii that a land commission award shall have been *set aside* upon any pretext whatever" (18 Haw. 638). The criticism of the language used in the opinion in the case of *Estate of Kaniu*, 2 Haw. 82, made in *Estate of Kekauluohi*, 6 Haw. 172, was approved, although it was conceded that "the actual decision of that case was not in conflict with the principles above cited, for the estate of Kaniu consisted of personal as well as real property, and the decision was to ad-

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mit the will to probate" (18 Haw. 638). It was held that the title to the land, equitable and legal, was in Mary H. Atcherley, and the decree of the court of land registration registering the title of Lewers & Cooke, Limited, was reversed. In denying a petition for a rehearing of that case (19 Haw. 47), it was held that the decree of 1858 was not controlling under the doctrine of *stare decisis* as that doctrine "is applied only when the rights of innocent purchasers for value have intervened as to the particular property;" it was said that there had been "no reversal of any findings of fact of the court of land registration;" and as to the case in 14 Haw., it was pointed out that, as a decision on demurrer, it was "by no means conclusive as predicting the final determination of the case," and the court was of the opinion that the case was not overruled. Then followed the entry in the court of land registration of a decree denying the petition of Lewers & Cooke, Limited, and upon appeal from that decree this court made a decree denying the petition without prejudice to the petitioner's right to obtain a registered title to other land which was included in the petition. On appeal to the supreme court of the United States the decree was affirmed.

Notwithstanding the statement made in the *Lewers & Cooke* case (19 Haw. 48) that there had been no reversal of the facts found by the court of land registration, the fact found by that court that Kinimaka "was the natural guardian of the minor" was not included in the findings of fact certified up by this court on the appeal to the United States supreme court. And the fact that the guardianship relation existed, vitally important though it was, seems to have received scant consideration in that case. That Kinimaka was the testamentary guardian of Kalakaua's property seems to be beyond the range of dispute at this time. If the relation existed in fact a question as to the regularity of the appointment would not prevent the assertion of any rights the ward would otherwise have against the guardian. "It is not essential that a legal guardianship

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should exist; the doctrine (constructive fraud) applies wherever the relation subsists in fact." 2 Pom. Eq. Jur. Sec. 961.

We are satisfied that this court fell into error in the *Lewers & Cooke* case in taking the view that the equity suit before Chief Justice Allen constituted an attack on the award of the land commission and that the decree in that suit amounted to a setting aside of the award. None of the prior decisions in this jurisdiction which were cited in support of the view taken are authority for the conclusion reached, as an examination of them will show.

Kukiiahu v. Gill, 1 Haw. 54. That was an action of trespass upon land. The defendant claimed under a royal patent dated in 1849 and an anterior deed from one Kalua. Plaintiff claimed under a royal patent dated in 1850 which was based on a land commission award. As to the merits of the respective claims under the patents, it was pointed out that that of the defendant was subject to the rights of natives and, therefore, subject to the plaintiff's title under his award. And as to the claim under the deed of Kalua it was shown that both the plaintiff and Kalua were claimants for the land before the land commission and that the contest was decided in favor of the plaintiff. It was the judgment of the land commission in that contest that resulted in the award to the plaintiff, and it was that judgment, which under the law was final unless reversed on appeal to the supreme court, there having been no such appeal, that was held could not be reopened on the allegation that the plaintiff had prevailed before the land commission upon false testimony. It was an attempt to show in an action at law that the award of the land commission was erroneous.

Kalakaua v. Keaweamahi, 4 Haw. 577. In that case the plaintiffs sought relief in equity because of fraud alleged to have been committed by defendants' ancestor upon the ancestor of plaintiffs' grantor. The case was heard upon bill and demurrer. It appeared that one Kaunuohua (under whom plaintiffs claimed) who was the wife of Moehonua (under whom defendants

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claimed) made claim for certain land before the land commission and died pending action by the commission; that after her death the lands were awarded to Moehonua (Kaunuohua for Moehonua); it was alleged that no new proofs were taken by the land commission after Kaunuohua's death; and it was contended that the award was made as it was through Moehonua's fraud.

The court held it could not assume that the land commission had no authority for issuing the award in the form in which it was issued, and that the failure to record evidence to sustain the award would not vitiate it. Other points were involved. The demurrer was sustained with leave to amend. In that case also it was attempted to show that the award was erroneous. A review of the proceedings of the land commission was sought. If Kaunuohua's heirs, who, it must be assumed were *sui juris*, appeared and contested the matter with Moehonua, the decision of the land commission against them was conclusive in the collateral proceeding, and if they did not contest with Moehonua they were in default and the award was equally conclusive. Their only possible remedy was by appeal from the judgment of the land commission.

Kaai v. Mahuka, 5 Haw. 354. That was a bill to declare a trust, but there was no element of trust involved. It seems that two brothers, Mahuka and Kaai, were entitled to an award of land in common; that Mahuka presented a claim for the land to the land commission in his own name, and at the hearing admitted that his brother had an equal right with him; that the award was headed "Mahuka and Kaai" but the grant was to Mahuka alone. The learned chancellor said that Kaai "may have, for all we know, relinquished his claim by an unrecorded deed now lost. It is to be presumed that he was aware of the award to Mahuka alone, and that he consented to it." Clearly, if Kaai had any fault to find with the award it was for him to follow the remedy which the law gave him by appealing to the supreme court.

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That it was an attempt to correct a supposed error of the land commission which involved an attack on the judgment is shown by the remark made by this court that "Every year which passes increases the force of the reason which demands that the adjudications of the land commission be not now re-examined."

Estate of Kekauluohi, 6 Haw. 172. That was a petition in probate to establish a lost will before Mr. Justice Judd in 1876. After holding that the contents of the will, which, it was claimed, devised certain lands, some of which the testatrix owned and some she did not own, had not been proven, the learned justice pointed out that the fact that the will must have taken effect upon the death of the testatrix, June 7th, 1845, furnished a basis for claims for land "arising previously to the tenth day of December, 1845," which should have been, and, it seems, in fact were, presented to the land commission for confirmation, furnished an additional reason for refusing the application.

Thurston v. Bishop, 7 Haw. 421. That was an action of ejectment instituted by the minister of the interior of the Hawaiian Kingdom against the trustees of the estate of B. P. Bishop, deceased, to recover certain land held by the defendants. The plaintiff claimed that as the land had not been awarded by the land commission or granted by the government the title was in the government. The court found that the sole question involved was whether Lot Kamehameha, from whom the defendants claimed, was barred of his rights in the land (it being conceded that he would have been entitled to an award of the land had his claim been presented) by reason of his own or any one's failure to present the claim within the time required by law to the land commission, Lot Kamehameha being a minor. The question was answered in the affirmative. It was held that it was the duty of the minor's guardian (his father) to have made claim for the land on behalf of his ward and that his failure so to do was binding on the minor.

The question now presented is whether a minor on coming of age could obtain relief in equity against a guardian who had,

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in fraud of his ward, presented a claim and obtained in his own name an award from the land commission of title to the minor's land. This question was neither involved nor discussed in any of those cases.

The case of the guardian of a minor obtaining an award in his own name of land belonging to his ward is analogous to the case of a guardian who purchases land with money belonging to the ward and, in violation of his fiduciary duty, intentional or otherwise, takes the title in his own name. In such a case, it is well settled, equity, regarding the land as being the property of the ward, will declare and enforce a constructive trust in favor of the ward and order the conveyance of the legal title. 3 Pom. Eq. Jur. Secs. 1052, 1058.

Where, as was shown in the case of *Kalakaua v. Pai and Armstrong*, an award of land had been obtained by the guardian during the ward's minority, and the ward had asserted his right without delay after coming of age by instituting suit against the guardian and, upon his death, his widow and devisees, the appropriate relief, if complainant was entitled to relief, undoubtedly would be a declaration of trust and an order to convey the legal title. The bill of complaint in that case alleged the death, testate, of Kaniu in 1843; the devise to the complainant who at that time was an infant; the designation of Kinimaka as testamentary guardian of the property of the complainant; the discovery, on complainant's coming of age, that his guardian had fraudulently procured certain awards of lands in his own name; the admission of Kaniu's will to probate; the title to the lands in Kinimaka in trust for the use and benefit of the complainant; the death of Kinimaka in 1857, leaving a widow and three children; and that the procuring of said awards by Kinimaka in his own name was contrary to equity and good conscience. The complainant prayed for a decree declaring that Kinimaka procured the awards and held possession of the lands for the use and benefit of the complainant; that the widow and the guardian of the children be ordered to convey all their

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right, title and interest in said lands to the complainant; and for further relief. Counsel for the appellants contend that the fact that at the hearing in that suit the complainant put in evidence the record of the land commission in the matter of Kinimaka's application shows that a review of the proceedings before the commission was attempted. We do not accept that view. That record was properly adduced to show that Kalakaua's claim had not been presented to the land commission. The theory upon which the suit proceeded and the object aimed at preclude the notion that it was desired to have the award to Kinimaka set aside or annulled. The upholding of the award was essential to the success of Kalakaua's suit. To attack and set aside the award would have been to take from Kinimaka's representatives the very title which the complainant was seeking to compel them to convey to him.

If A, by fraud, obtains a judgment against B, B may obtain equitable relief against the enforcement of the judgment by showing the fraud and asking equity to intervene because of it. Broadly speaking it may be called an attack on the judgment though equity acts *in personam*. But if A obtains a valid judgment against B and secures the fruits of that judgment, and by reason of A's relation to C, A is the constructive trustee for C of those fruits, C may proceed in equity to take them from A. The suit of C against A clearly would not constitute an attack on the judgment against B, but would assume and maintain its validity. Such is the case here. The suit before Chief Justice Allen was not an attack on the award of the land commission; it was not an attempt to review the proceedings of the land commission or to correct or set aside the award to Kinimaka. On the contrary, it assumed the correctness of the judgment of the land commission and the validity of the award. It was an entirely new proceeding based upon the assertion that the legal title to the land was vested in Kinimaka and his heirs by and under a valid award issued by the land commission, but that because of the other facts averred, the defendants held as con-

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structive trustees for the benefit of the plaintiff. Furthermore, the new proceeding sought to assert a right which had accrued to the complainant since the date of the award to Kinimaka, namely, the right of a minor, upon his reaching his majority, to demand of his guardian a full and true report of his acts with reference to the trust property, an honest accounting of all thereof, and a conveyance of such of it as stood in the guardian's own name. If Kinimaka had failed to present any claim for this land to the land commission either on behalf of his ward or in his own name no title would have been acquired. *Thurston v. Bishop*, supra. Kalakaua could not have followed the property because it would then have been beyond reach. But having obtained the award, Kinimaka, or those claiming under him, could not be allowed to say that the claim of Kalakaua had been litigated and disapproved by the land commission either on the theory that Kinimaka based his claim on an alleged gift from Liliha, or otherwise. Kalakaua's claim to this land as against Kinimaka was not presented to the land commission and, consequently, was never passed upon by that tribunal, but that could not be attributed to any fault or neglect on the part of Kalakaua. There is an unmistakable analogy between the right of Kalakaua to the relief sought by him in the suit before Chief Justice Allen and the right of one to an injunction or other relief in equity against a judgment at law fraudulently obtained where the circumstances were such that the fraud could not have been shown in defense of the action. Such a case ordinarily is not regarded as an attack upon the judgment or a review of the proceedings had in the law action, but as the assertion and recognition of a distinct and theretofore unlitigated right. "The suit in chancery does not draw in question the judgment and proceedings at law or claim a right to revise them. It sets up an equity independent of the judgment which admits the validity of that judgment, but suggests reasons why the party who has obtained it ought not to avail himself of it. It proposes to try a question entirely new,

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which has not been and could not be litigated at law. It may be brought before the commencement of a suit at law, pending such suit, or after its decision by the highest law tribunal." *Parker v. Circuit Court*, 12 Wheat. 562, 564. See to the same effect, *Johnson v. Waters*, 111 U. S. 640, 667; *Arrowsmith v. Gleason*, 129 U. S. 86, 101; and *Marshall v. Holmes*, 141 U. S. 589.

Within these principles, then, the decree of 1858 was not erroneous but right. We do not impugn, but re-affirm, the doctrine so often announced that the awards of the land commission were final and conclusive if not appealed from within the time allowed by the statute, but we do say that the proceeds of such an award, like the fruits of a judgment at law, may be subjected to the equitable rights of others where those rights, if existing prior to the judgment, were suppressed through fraud committed by him who obtained the award upon one who could not act for himself, or have accrued since. To hold otherwise would be to place awards of the land commission upon a plane higher than that accorded to the most solemn judgments of courts of law acting within unquestioned jurisdiction. There is nothing in the judicial history of these Islands which would warrant us in according such a position to the judgments of the land commission. It does not militate against the view here taken that the land commission had jurisdiction to consider equitable as well as legal claims, for the circumstances of this case, which must be admitted to be exceptional, show that notwithstanding the broad powers of the land commission, a case may have occurred where a claim failed of presentation not merely without fault on the part of the one who, being incapable of acting on his own behalf, had the right to have it presented for him, but through the fraud of the one upon whom the law imposed the duty of presenting it on the other's behalf who successfully asserted it in his own name.

If the decree in *Kalakaua v. Pai and Armstrong* was right it ought to be enforced. If the decision in the *Lewers & Cooke*

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case was correct the present bill should be dismissed, but if it was wrong, in justice to the appellee, it ought not to be followed if it can be avoided.

Being of the opinion that this court was wrong in the conclusion reached in the *Lewers & Cooke* case, and that the decree of 1858 was not "erroneous in a fundamental principle," and, for the reasons stated in the former opinion in the case at bar, should not be reopened, we should feel inclined to depart from the ruling made in the *Lewers & Cooke* case were we not bound by it because of its having been affirmed by the United States supreme court.

Counsel for the appellants contend that under the decree in the *Lewers & Cooke* case the whole matter is *res judicata*. But as the appellee was not a party to that case and is not a privy of Lewers & Cooke, Limited, the ground is untenable. Counsel for the appellee urge the doctrine of "the law of the case," invoking the former decision in the case at bar. Both sides seem to assume that the decisions in the two cases are in conflict. The *Lewers & Cooke* case, however, was decided on a point which was not touched upon in the decision on the demurrer in the present case, and although it was held in that case that the decree of 1858 ought not to be enforced the decision rested upon ground which was not inconsistent with that taken in the prior decision in the case at bar. The rule of the law of the case, therefore, does not as counsel have supposed, compel the choice of following one of two conflicting decisions. We think the application of that rule is not involved here. The point upon which this case now hinges was adjudicated in the case in which the appellee was not a party, but was not considered when this case was last before this court. In the *Lewers & Cooke* case the supreme court of the United States held that the decree made in *Kalakaua v. Pai and Armstrong* was erroneous and that the judgment of the land commission awarding the title to the land in dispute to Kinimaka was conclusive and binding against Kalakaua and those who claim through and

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under him. That decision is binding upon this court and we must follow it. "Under the rule of *stare decisis*, where a principle has been passed upon by the court of last resort, it is the duty of all inferior tribunals to adhere to the decision, without regard to their views as to its propriety, until the decision has been reversed or overruled by the court of last resort or altered by legislative enactment." 26 A. & E. Enc. Law (2nd ed.) 163. It makes no difference that in making that decision the supreme court followed the opinion of this court upon a matter of local law (222 U. S. 294) and that we now believe that that opinion was not well founded. If the former ruling is to be reversed the reversal is to be made by that court and not this. The most that we can do now is to respectfully point out wherein, in our judgment, the former opinion was wrong. This we have done believing it was our duty to do it, and with this our duty in the premises ends. Counsel for the appellee argue that we are not bound to follow the decision of the United States supreme court in the *Lewers & Cooke* case because the fact that Kinimaka was the guardian of Kalakaua at the time the claim for this land was presented to the land commission was not included in the findings of fact which were certified up on the appeal to that court. The facts remain, however, that the guardianship had been found as a fact by the court of land registration and that finding was before this court in the *Lewers & Cooke* case, and that the decree entered in that case was affirmed on appeal, with the result, as above stated, that we are concluded by the decree.

The decree appealed from is, accordingly, reversed, and a decree will be entered in this court dismissing the bill of complaint.

C. W. Ashford and D. L. Withington (*Castle & Withington* with them on the brief) for plaintiff.

Lyle A. Dickey pro se and A. A. Wilder (*Thompson, Wilder, Watson & Lymer* on the brief) for defendants.

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OPINION OF PERRY, J., CONCURRING IN PART AND DISSENTING
IN PART.

The material facts in this case are precisely the same as those before this court and before the supreme court of the United States in the *Lewers & Cooke* case reported in 18 Haw. 625, 19 Haw. 47 and 222 U. S. 285. The only fact contended by the appellee to be before this court in the case at bar and not to have been before the supreme court of the United States in the *Lewers & Cooke* case is that Kinimaka was the guardian of Kalakaua at the time that the claim for the land was presented to the Land Commission. In addition to the fact noted in the majority opinion that the guardianship was found as a fact by the court of land registration, that that finding was before this court in the *Lewers & Cooke* case and that the decree in that case was affirmed on appeal, the answer to the contention is that this court deemed the fact of the alleged fraud, and therefore of the guardianship immaterial and that the supreme court of the United States considered the case as though the fact of the guardianship was properly before it. "It is immaterial whether Kinimaka had received the land from Liliha or from Kaniu, and whether, if from Kaniu, he was guilty of actual fraud in procuring his land commission award or whether he acted under the honest belief that the disapproval of Kaniu's will by the King and the verbal giving of the lands to him was conclusive." 18 Haw. 625, 638, 639. "So it is said that Kinimaka was the natural guardian of Kalakaua, we presume on the evidence that Kaniu assented to a suggestion that she had better leave her property in Kinimaka's hands till Kalakaua came of age. But it would be going rather far to apply the refined rules of the English chancery concerning fiduciary duties to the relations between two Sandwich Islanders in 1846, on the strength of such a fact." 222 U. S. 285, 294. To grant the relief prayed for in this suit would be to attempt to disregard and render ineffectual the decision of the supreme court of the United States in the *Lewers & Cooke*

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case. I concur in the view that that decision is binding on this court in the case at bar and that, following it, the decree appealed from should be reversed and a decree entered dismissing the bill of complaint.

This sufficiently disposes of the case, but since the majority has expressed its view to the effect that the decisions of this court and of the supreme court of the United States are incorrect, I feel impelled to state, briefly, my views on the subject.

In my opinion the decisions referred to were correct in regarding the equity decree of 1858 as an attack upon the land commission award to Kinimaka and in declining to countenance the attack. In form, perhaps, it was not; but in substance and in effect, it was. The appellee invokes the general rule relating to the jurisdiction in equity concerning judgments obtained by fraud. "The suit in chancery does not draw in question the judgment and proceedings at law or claim a right to revise them. It sets up an equity independent of the judgment which admits the validity of that judgment, but suggests reasons why the party who has obtained it ought not to avail himself of it. It proposes to try a question entirely new, which has not been and could not be litigated at law." *Parker v. Circuit Court*, 12 Wheat. 562, 564; and similar cases. That rule, however, can have no application to the case at bar or the suit in equity of 1858. If applied, it violates the spirit of the gift of Kamehameha III when he relinquished to the people his title to a large part of the royal domain and the spirit and the letter of the laws enacted to effectuate that gift. I cannot do better at this point than to quote from a familiar statement of the history of land titles in Hawaii. "There is a time in the history of every original nation not formed by colonization, when as it emerges from barbarism into civilization, titles to land may be said to have a beginning by positive institution of the people of such nation. Previous to the advent of Christianity to this country, in the early part of this century, Kamehameha

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I., as King by right of conquest, was the lord paramount and owner of all the land of this Kingdom. This right continued in his successors until the reign of Kamehameha III. Under this King a government, under a constitution and laws, had its birth, superseding a government of the arbitrary will of the King. Claims of one character and another to the possession of land had grown up, but there was no certainty about them, and all was confusion; and finally, after years of discussion had between the King, the chiefs, and their foreign councillors, the plan of a Board of Commissioners to Quiet Land Titles was evolved, and finally established by law, for the purpose of settling these claims and affording an opportunity to all persons to procure valid paper titles emanating from the Government representing the sovereignty, the source of all title to land in this Kingdom, to the land which they claimed. As a part of this scheme Kamehameha III., with unexampled magnanimity, relinquished his claim of ownership as sovereign to over two-thirds of the entire territory of the Kingdom, in order that the same might be awarded to the chiefs and common people by the Land Commission. The Commission was authorized to consider possession of land acquired by oral gift of Kamehameha I., or one of his high chiefs, as sufficient evidence of title to authorize an award therefor to the claimant. This we must consider as the foundation of all titles to land in this Kingdom, except such as come from the King, to any part of his reserved lands, and excepting also the lists of Government and *Fort* lands reserved." *Thurston v. Bishop*, 7 Haw. 421, 428. Immediately prior, then, to the creation of the Land Commission, while claims of one character and another to the possession of land had grown up, there was no certainty about them. All was confusion. The constitution of October 8, 1840, sometimes referred to as the constitution of 1839 (see *Thurston's Fundamental Law of Hawaii*, p. 1), did, indeed, provide that "protection is hereby insured to the persons of all the people, together with their lands, their building lots, and

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all their property, while they conform to the laws of the kingdom, and nothing whatever shall be taken from any individual except by express provision of the laws"; but it also declared: "Kamehameha I, was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, though it was not his own private property. It belonged to the chiefs and people in common, of whom Kamehameha I was the head, and had the management of the landed property. Wherefore, there was not formerly, and is not now any person who could or can convey away the smallest portion of land without the consent of the one who had, or has the direction of the kingdom." And in 1843 or 1844 we find the King disapproving of the will of Kaniu made subsequent to the date of the constitution. All was still chaos. It was for this very reason that the King, adopting an enlightened and progressive policy, made his gift. To me it seems impossible, under these circumstances, to regard Kaniu or upon her death her donee, Kalakaua, as holding even the beneficial or equitable ownership of the land as distinguished from the legal title. To sustain appellee's contention and uphold the decree of 1858 requires as an essential prerequisite the finding or the assumption that the equitable ownership at least, as that term is understood at the present day, was in Kaniu and from her passed to Kalakaua. Upon no other theory could Kinimaka or his heirs be declared to be trustees for Kalakaua.

The establishment of the Land Commission was a part of the scheme for the accomplishment of Kamehameha's purpose to relinquish his claims to the land and to vest titles in individuals. It was given power to hear and, finally determine, subject only to appeal to the supreme court, all claims to land and to make awards therefor. In its creation it was recognized by the King and all others concerned that "the Hawaiian rulers have learned by experience, that regard must be had to the immutable law of property, in things real, as lands, and in things personal, as chattels; that the well being of their country must essentially

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depend upon the proper development of their internal resources, of which land is the principal; and that in order to its proper cultivation and improvement, the holder must have some stake in it more solid than the bare permission to evolve his daily bread from an article, to which he and his children can lay no intrinsic claim. They perceive by contact with foreign nations, that such is their uniform practice, and that the rules of right under that practice are contended for, understood and likely to be applied, in regard to the lands otherwise held at their hands by a tenancy incomprehensible to the foreigner. They are desirous to conform themselves in the main to such a civilized state of things, now that they have come to be a nation in the understanding of older and more enlightened governments." Principles of the Land Commission, R. L., p. 1171. The Board was given very broad powers. "A wide latitude is thus left to the Commissioners, who must, in passing upon the merits of each claim, first elicit from creditable witnesses, the fact or history of each; and thus assort or reconcile those facts to the provisions of the civil code, whenever there is a principle in past legislation applicable to the point under consideration; but when no such principle exists, they may judicially declare one, in accordance with ancient usage and not at conflict with any existing law, nor at variance with the facts, and altogether equitable and liberal." *Ib.*, 1175. It had power, of course to refuse awards as well as to make awards. It considered equitable claims as well as legal (*Ib.*, pp. 1169, 1175) as far as those terms could be applied to the kind of titles theretofore existing. It had power to make an award to one in trust for another. For illustrations of the exercise of that power see *Kane v. Perry*, 3 Haw. 663; and *Kalakaua v. Keaweamahi*, 4 Haw. 577. Claims of infants were presented by their parents or guardians and the statute prescribing a time limit for the presentation of claims made no exception in favor of infants. Minors were bound by the neglect of their guardians to present their claims. *Thurston v. Bishop*, 7 Haw. 421. So, also,

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were all persons bound by an award, unappealed from, even though it was procured by false testimony. *Kukiiahu v. Gill*, 1 Haw. 54.

In view of the uncertain tenures of land prior to the creation of the Land Commission, the King's gift and its terms, the provisions of the law intended for its accomplishment and the subsequent judicial declarations concerning the finality of the determinations of the Land Commission, the equitable jurisdiction over the fruits of a judgment obtained by fraud cannot be successfully invoked. Relief was sought in 1858 and is sought now, not by reason of any facts occurring after the date of the award but by reason of facts all of which existed prior to the proceedings before the Land Commission. There was no new question before the equity court in 1858, and there is none now, which could not have been litigated before the Land Commission. If Kinimaka in a spirit of fairness, at the time of the presentation of his own claim to the land, whether that claim was through Liliha or through Kaniu, made known to the Commission the attempted devise by Kaniu to Kalakaua or if the latter fact otherwise appeared in evidence at the hearing (the failure of the Commission to record evidence to sustain an award does not vitiate it, *Kalakaua v. Keaweamahi*, supra), it was within the province of the Commission (a) to refuse to award the land to Kinimaka, or (b) to award it to Kinimaka in trust for Kalakaua, or (c) to award it to Kalakaua, or (d) to award it to Kinimaka. If it decided, whether correctly or incorrectly, either that Liliha had a stronger claim than Kaniu or that Liliha's claim was unfounded and that the King's disapproval of Kaniu's oral will was effective and his own subsequent gift to Kinimaka good, it was beyond the power of the equity court, directly or indirectly, to set aside that decision or render it nugatory. If, on the other hand, the fact of Kaniu's attempted devise to Kalakaua was not made known to the Commission, it was, as to Kalakaua, an instance of a minor bound by the failure of his guardian to present his

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claim, whether the failure was due to mere neglect or to fraud. *Thurston v. Bishop* and *Kukiahū v. Gill*, supra; and other cases cited in 18 Haw. 625. Cases of ordinary guardians, whose wards have, beyond controversy, the entire beneficial ownership of the land, and of persons entrusted by another with money to purchase land, are not parallel. Neither Kaniū nor Kalakaua had any unassailable title, legal or equitable; they had at most a mere right to apply to the Land Commission for a title. *Thurston v. Bishop*, 7 Haw. 421, 433. In the absence of an appeal to the supreme court the Commission's refusal or failure to award the land to them was conclusive. It is not as though a title existed, to be protected in equity. To the very existence of a title a land commission award was necessary.

The Hawaiian cases referred to in the opinion in the *Lewers & Cooke* case to my mind support and lead irresistibly to the conclusion there reached, that the decree of 1858 was an indirect attack on the award, that the award of the Land Commission is a final adjudication of all claims to the land awarded existing prior to December 10, 1845, that such awards are, with the exceptions mentioned in *Thurston v. Bishop*, supra, the foundation of all titles to land in these Islands and conclusive against every form of attack save the appeal provided by law,—a tradition "fortified by logic and good sense." 222 U. S. 285, 294, 295. In 18 Haw. 625, 638, it was correctly said that if the decree of 1858 shall be now enforced, "it will be the first time in the judicial history of Hawaii that a Land Commission award shall have been set aside upon any pretext whatever." Announcement should not now be made judicially that an awardee may, in spite of the award, possibly have been the holder of the bare legal title in trust for another and that he or his successors may be decreed in equity to convey to that other.

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M. F. SCOTT AND NETTIE L. SCOTT v. KONA DEVELOPMENT COMPANY, LIMITED, A CORPORATION.

TAXATION OF COSTS.

ARGUED FEBRUARY 10, 1913.

DECIDED MARCH 4, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

Costs—transcript of evidence—effect of stipulation.

An expenditure for a transcript ordered by the opposing parties under an unqualified agreement entered into by them that each would pay one-half of the expense is not taxable as costs in favor of the prevailing party.

Id.—prevailing party.

Costs will be awarded in favor of a party whose exceptions to rulings allowing certain items as costs in favor of the opposite party are sustained, even though other exceptions to the judgment in chief do not prevail.

Id.—unnecessary papers.

Expenditures incurred in the preparation and filing of papers unnecessarily made a part of a bill of exceptions are not taxable as costs of the appeal.

OPINION OF THE COURT BY PERRY, J.

Following the disposition of the bill of exceptions in this cause (ante, p. 408), the plaintiffs present in this court their bill of costs of the appeal, praying for the taxation against the defendant of the sum of \$2500 "paid for stenographers' fees and expenses" and other items amounting in the aggregate to \$226.75.

Concerning the item of \$2500, the facts are undisputed. The trial commenced on September 20, 1910, and ended on August 16, 1911. The minutes for September 30, 1910, contain the following: "Order for transcript in this case made by the court. Cost of the same to be paid one half by plaintiffs and one half by defendant." Thereafter, from time to time, the stenographers in attendance prepared a transcript of their notes of the testimony and of the minutes of the proceedings,

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in three copies, delivering one copy to the trial judge and one each to counsel for the plaintiffs and to counsel for the defendant. The cost of the whole transcript was \$5000 or a little over that sum and was paid one-half by each of the parties. Upon the rendition of the judgment for defendant, on the ground of non-joinder of parties defendant, the defendant claimed in its bill of costs (and was allowed) the sum of \$2559.35 for "actual disbursements, stenographers' fees and expenses", filing in support or explanation of the claim and affidavit of its leading attorney in which the affiant deposed "that his understanding of the arrangement in reference to the transcript is, that the parties agreed that the transcript should be written up and three copies furnished, one to the court, one each to the plaintiffs and to the defendant, the costs to be equally divided, one half to be paid by the plaintiffs and one half by the defendant;" that it was his "understanding at the time that these payments constituted no part of the costs during any stage of the case, but that after the decision of the cause Mr. Milverton, one of the attorneys for the plaintiff, called his attention to the fact that no order had been made and no agreement appeared in the transcript upon the point, and that the matter was open, intimating, but not directly saying, that had the plaintiffs won, a claim for the costs of the transcript would have been made by them"; and that "for this reason the defendant included this item in its costs bill." Plaintiffs objected to the allowance of the item upon the ground that "under the stipulation of the parties made in open court during the trial of the above entitled action it was not contemplated that such disbursements should be taxable costs in the action" and in a statement filed at the request of the trial court counsel for plaintiffs stated that his recollection of the "arrangement" between the parties was that "one half of the expense of preparing this transcript was to be borne by the plaintiffs and defendant respectively" and that "there was nothing, so far as I recollect now, said, as to whether or not the fees paid by either party

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for the transcript should be taxed as costs in the action." These statements of counsel are, in substance, in entire accord with each other and with the minutes. It is clear that the stipulation under which the transcript was prepared and paid for was that one-half of the cost should be ultimately borne by each of the parties and that it was not contemplated by them that the disbursements should be taxable as costs in the action. When the question first arose in the trial court, the recollection and construction of the stipulation by both attorneys was to this effect. The error in the allowance in defendant's favor of the item of \$2559.35 will doubtless be corrected upon re-taxation of costs after entry of the judgment of nonsuit as directed. The item of \$2500 in the present bill is disallowed.

As to the remaining items. Defendant's contention that the plaintiffs did not prevail upon their exceptions and are therefore not entitled to any costs cannot be sustained. The substantial effect, rather than the form, of the decision upon the exceptions must, indeed, be considered; but while the change directed in the form of the judgment did not, perhaps, substantially benefit the plaintiffs, since the judgment on the ground of non-joinder, like the judgment of nonsuit, would not have been a bar to new proceedings upon the same cause of action and since the judgment of nonsuit, upon the ground upon which it was based, effectually prevents a continuance or renewal of the action of assumpsit while the judgment for non-joinder did not of itself have that effect, nevertheless other exceptions, to rulings on the subject of costs, were sustained and resulted in a reduction in plaintiffs' favor of \$2213.06 from the amount of the judgment below. The plaintiffs did, therefore, prevail upon their bill of exceptions and are entitled to the costs of the appeal.

The following papers, however, were made a part of the record unnecessarily: four briefs filed in the trial court, demurrer to first complaint, stipulation waiving jury, motion to set demurrer for hearing, defendant's objection to same, first amended

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complaint, motion to amend first amended complaint, notice to admit certain facts, motion for leave to amend complaint, three stipulations for continuances, one stipulation extending time for filing of briefs, two motions for leave to amend third amended complaint, notice of deposition of Pvormann, notice of application for order extending time for filing bill of exceptions, order to return exhibits, defendant's objections to plaintiffs' bill of exceptions, affidavit of D. L. Withington on same, notice of presentation of bill of exceptions, motion by plaintiffs that defendant's objections to plaintiffs' bill of exceptions be overruled, defendant's further objections to plaintiffs' bill of exceptions, order that plaintiffs file bond in the sum of \$10,000, motion to certify transcript, direction to prepare and furnish a transcript and stenographers' return to same. As to these, the costs charged amounting to the sum of \$33.85 are disallowed.

The remainder of the bill is allowed. Costs are taxed against the defendant in the sum of \$192.90.

F. W. Milverton (*J. W. Cathcart* with him on the brief) for plaintiffs.

D. L. Withington and *A. L. Castle* (*Castle & Withington* on the brief) for defendant.

TERRITORY OF HAWAII v. TAKAMINE.

APPEAL FROM DISTRICT MAGISTRATE OF WAILUKU.

ARGUED FEBRUARY 20, 1913.

DECIDED MARCH 4, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

INDICTMENT AND INFORMATION—*immaterial averment—surplusage need not be proved.*

An averment in an indictment or charge which does not relate to any necessary element of the offense charged, and without which an offense is fully set forth, will be regarded as surplus-

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age. Such an averment need not be proved, and the charge will not be vitiated by its presence.

EVIDENCE—corroborative circumstances.

Upon a charge of practicing medicine without a license by performing a specific act of treatment of disease, evidence that the accused the day before the commission of the alleged act asserted that he had cured disease and could effect cures by the use of the drug which he is alleged to have used in the particular case, is admissible as corroborative evidence which tends to explain and characterize the act, and to negative a possible claim that it was one of mere friendly and non-professional assistance.

PHYSICIANS AND SURGEONS—the practice of medicine—proof of single act.

A single act of the use of a drug for the treatment of disease in the human subject, performed by one upon another, may constitute the practice of medicine within the meaning of sections 1068 and 1069 of the Revised Laws, where there is other evidence in the case which colors and characterizes that act and tends to show that it was not a mere casual or friendly one, but one purporting to be of a professional character.

OPINION OF THE COURT BY ROBERTSON, C.J.

The defendant has appealed upon points of law from a judgment of conviction entered against him in the district court of Wailuku.

The charge upon which the defendant was prosecuted alleged, "That Takamine, at Wailuku, District of Wailuku, County of Maui, Territory of Hawaii, on the 20th day of December, A. D. 1912, did practice medicine on one Dobara, by burning a drug known as Mogusa on the person of the said Dobara, for the treatment of asthma, without having a license so to do as required by law," etc.

The defendant demurred to the charge on the ground that it did not show a violation of any law of this Territory. The demurrer was properly overruled. The contention that the charge should have negatived the provisos contained in section 1069 of the Revised Laws is not well taken. The statute makes it a misdemeanor for any person to practice medicine or surgery in this Territory either gratuitously or for pay, or

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to offer to so practice, or to append the letters "Dr." to his name, with the intent thereby to imply that he or she is a practitioner of medicine or surgery, without having a valid unrevoked license, obtained from the treasurer of the Territory granted upon the written recommendation of the board of health, subject to certain special provisions, not pertinent here, relating to the practice of osteopathy and christian science. R. L. Sec. 1068, as amended by Act 124 of the Laws of 1909. Section 1069, as amended by Act 133 of the Laws of 1909, provides that the practice of medicine shall be held to include the use of drugs and medicines, water, electricity, hypnotism, or any means or method, or any agent, either tangible or intangible, for the treatment of disease in the human subject, provided that the statute shall not be held to forbid any person from the practice of any method, or the application of any remedial agent or measure under the direction or with the approval of a duly licensed physician, and that when such a physician shall have certified any case as hopeless any person may, when requested by or on behalf of the person hopelessly afflicted, give or furnish any remedial agent or measure. The provisions of the latter section are matters which an accused may show in defense, but they do not enter into the definition or description of the offense and, therefore, need not be negatived in the charge. *States v. Cook*, 17 Wall. 168, 173; *Rep. v. Ah Yee*, 12 Haw. 169; *State v. Kendig*, 133 Ia. 164, 168; *Harding v. People*, 10 Colo. 387, 394. The charge sufficiently set forth a violation of section 1068.

The defendant claims that the evidence does not support the judgment, and in this connection it is argued that there was no evidence that Dobara had asthma, or was treated for it; that there was no evidence that mogusa is a drug; and that the facts in evidence fall short of showing that the defendant practiced medicine within the meaning of the statute, in that evidence of a single act of administering medicine does not constitute the practice of medicine, and that the proofs do not nega-

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tive the idea that only a simple household remedy was being applied, or a mere casual or friendly act performed, and that such an act is not within the spirit of the statute even if within its letter. We hold that none of these claims can be sustained.

Dobara, in substance, testified that he had been ill for about a month; that he had pains in the chest and other parts of his body; that he had trouble in breathing; that he called on the defendant on the day mentioned in the charge and asked him to examine him and treat him; that he designated the parts on which he desired to have the treatment applied; that the defendant burnt mogusa on those parts; that it was a usual treatment; and that the applications relieved the pain. A police officer testified to having witnessed the treatment of Dobara by the defendant on the occasion in question, and a deputy sheriff was allowed to testify over defendant's objection that on December 19th he had asked the defendant if he was a doctor and that the defendant replied that he cured all kinds of sickness—cases that the doctors could not cure—through the use of mogusa, and that on the following day the defendant handed him two Japanese books which he said he had studied.

The charge does not allege that Dobara had the asthma. We think the pleader meant to aver that the defendant practiced medicine by burning mogusa on the person of Dobara for the treatment of asthma, i. e., that the defendant supposed or believed that Dobara had the asthma. But the defendant's diagnosis of Dobara's ailment was altogether immaterial and any averment as to what the defendant believed was mere surplusage. An averment which is descriptive of the identity of that which is legally essential to the charge cannot be rejected as surplusage though it be unnecessarily particular, but the averment in question did not relate to a necessary element of the offense; the charge was complete without it. The general rule is that an indictment will not be vitiated by surplusage and that such matter need not be proved. *People v. Aldrich*, 104 Mich. 455, 459; *Com. v. Lord*, 147 Mass. 399; *Hull v. State*, 120 Ind. 153;

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Barton v. People, 135 Ill. 405, 408; *State v. Corrigan*, 24 Conn. 286. The evidence made it clear that the defendant used the preparation for the treatment of disease in the human subject and so brought the act within the terms of section 1069.

There was evidence before the court to support a finding that mogusa is a drug. A "drug" is "any substance used as a medicine or in the composition of medicines for internal or external use," and "medicine" is "any substance or preparation used in treating disease; a remedial agent; a remedy." Webster's New International Dictionary. The unused contents of a package of mogusa were put in evidence and the testimony showed that the defendant used the substance as a remedy in the treatment of Dobara's ailment.

The testimony of the deputy sheriff was properly admitted. It tended to explain and characterize the defendant's act and to show that it was not one of mere friendly assistance but was performed by one who professed to be able to effect cures. In the case of *State v. Blumenthal*, 141 Mo. App. 502, 505, evidence of a sign on a door, and of advertising, was held to have been properly admitted because it tended to support the charge of practicing, notwithstanding the act of advertising as a physician was made an offense by the statute. And in *Mayer v. State*, 64 N. J. L. 323, 327, where the charge was of practicing medicine without a license by "prescribing for one Charles Hendrick a certain medicine," etc., it was held that a business card of the accused which tended to show his connection with a certain free dispensary was admissible as corroborative evidence for the prosecution as well as tending to rebut testimony given by the accused.

There is considerable force in the contention made by defendant's counsel that the word "practice" signifies frequent or repeated action and that the performance of a single act could not constitute the practice of medicine. But where, as here, other testimony in the case has colored and characterized the act, and has a direct tendency to show that the act was not a

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mere casual or friendly one, but one purporting to be of a professional character, we think it is brought within the intent of the statute. Thus, in *Antle v. State*, 6 Tex. App. 202, 206, it was said, "Bearing in mind that the violation charged in the information is the engaging in the practice of medicine without having furnished the clerk with a certificate of qualification, we are of opinion that proof of one act in violation of the statute would be sufficient to support a conviction, the proof being in other respects sufficient,—as that he held himself out to the community in which he lived or sojourned as a physician and the like."

Judgment affirmed.

L. P. Scott, Deputy Attorney General (Wade Warren Thayer, Attorney General, with him on the brief), for the prosecution.
Andrews & Quarles for defendant.

HOWARD D. BOWEN v. EMMA METCALF NAKUINA.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED MARCH 3, 1913.

DECIDED MARCH 11, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

MORTGAGES—foreclosure for default in payment of interest—insufficiency of tender.

In a suit for the foreclosure, for default in the payment of interest, of a mortgage providing that upon default in payment of the principal or the interest the mortgagee may foreclose and apply the proceeds of the sale as far as necessary to the payment of the principal, the interest and the costs, including a reasonable attorney's fee, tender of the amount of the interest and the costs of court is, in the absence of other defenses, and without a tender of a reasonable attorney's fee for services to date of tender, insufficient to ward off foreclosure.

Bowen v. Nakuna, 21 Haw. 470.

PLEADING—replication in equity—curing failure to reply.

If a complainant has omitted to file a replication within the time limited by rule, the court may grant leave to file it afterwards. When proof is necessary to a proper understanding of the case and a hearing upon bill and answer alone may work injustice to the complainant and the filing of a replication will cause no prejudice to respondent, leave to file one should be granted, at least when applied for without unreasonable delay and before the trial is commenced.

OPINION OF THE COURT BY PERRY, J.

This is a suit in equity to foreclose a mortgage given to secure a note for \$2000 bearing interest at six per cent. per annum. The mortgage, a copy of which is made a part of the bill, was executed February 10, 1912. Alleging non-payment of the first instalment of interest, due August 10, 1912, the suit was instituted on December 2, 1912. Respondent's answer was filed on January 7, 1913, admitting that the interest remained unpaid, alleging that "for the purpose of paying said interest * * * defendant sought the plaintiff herein but was unable to reach or find him" or any duly authorized agent of his, charging that "plaintiff purposely avoided defendant for the purpose of compelling a breach of the covenant to pay said interest" and making tender of the sum of \$75 for the interest due and for costs. January 20, 1913, the parties filed a written stipulation that the suit be "set down for hearing and be heard" on January 25. On the date named, respondent moved that, no replication having been filed, the bill be dismissed on the pleadings. Counsel for complainant thereupon stated that his understanding was that the only pleadings required were a bill and an answer and that the cause was at issue and that he was ready to prove his bill, but that if a replication was by the court deemed necessary he would file one. The court ruled that a replication was necessary, refused leave to complainant to file one and, regarding the answer as true, dismissed the bill. From the decree to that effect complainant appeals.

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In the mortgage the mortgagor covenanted, *inter alia*, to pay the interest semi-annually on the 10th days of August and February in each year and it was expressly provided that if default should be made "in payment of the principal money hereby secured within the time limited for the payment thereof or in the payment of the interest thereon as herein provided for, or in case of the breach of any of the covenants and conditions" contained in the instrument, the mortgagee should have full power and authority to foreclose the mortgage by a suit in equity and to apply the proceeds of the sale as far as necessary to the payment of the principal, interest and costs, including a reasonable attorney's fee. Upon breach of the covenant relating to the payment of interest the mortgagee was entitled to institute a suit for foreclosure and to employ counsel for the purpose in reliance upon the mortgagor's contract to pay the attorney's fee out of the proceeds of the sale. While there are authorities to the contrary we believe the better rule to be that when, under a mortgage with provisions such as those contained in that involved in this suit, a tender is made by the mortgagor, after commencement of the suit, in order to ward off foreclosure, the amount of a reasonable fee for the services of the mortgagee's attorney rendered in the suit to date of tender must be included in the offer. The party seeking relief against the forfeiture must tender sufficient to make the other party whole. The tender of \$75 was intended to include payment of the first instalment of interest, \$60, and the costs of court and of itself was plainly insufficient to ward off foreclosure. No offer was made of the amount of an attorney's fee. Whether the tender should also include the amount of the principal of the mortgage need not be determined on this appeal.

The complainant offered to file a replication denying the truth of the allegations of the answer as to the mortgagee compelling a breach of the covenant relating to interest and to prove his bill. He should have been permitted to do so even though a circuit court rule required that replications be filed "within

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ten days after service of the pleading to which reply is made." A replication is a mere formal pleading and if a complainant has omitted to file one at the proper time, the court may allow it to be filed afterwards. The trial had not commenced when application was made for leave to present one. If respondent desired a continuance for the purpose of producing witnesses to meet the issues raised by the replication she could have obtained one readily. The granting of the desired permission could not possibly have prejudiced respondent, while its refusal might have resulted in grave prejudice to complainant. In the dismissal of the bill the complainant was denied all relief in spite of the admitted existence of the mortgage debt and non-payment of the interest and without an opportunity having been accorded him to present, upon the only disputed point, the proof which he offered, to the effect that he did not compel the breach of the covenant.

The decree appealed from is reversed and the cause remanded with directions to permit the complainant to file a replication and for further proceedings not inconsistent with this opinion.

G. A. Davis for complainant.

R. P. Quarles (*Andrews & Quarles* on the brief) for respondent.

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ROSALIE LYONS *v.* THOMAS BENJAMIN LYONS.
THOMAS BENJAMIN LYONS *v.* ROSALIE LYONS.

APPEALS FROM CIRCUIT JUDGE, SECOND CIRCUIT.

ARGUED FEBRUARY 24, 1913.

DECIDED MARCH 12, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

DIVORCE—*extreme cruelty.*

Extreme cruelty, as a ground for divorce, implies physical injury, either actual or apprehended. Personal violence need not be shown, but the infliction of mental suffering is not a ground for divorce unless its actual or reasonably apprehended effect is injurious to the health of the complaining party.

Id.—*neglect to provide suitable maintenance.*

Where a wife sues her husband for a divorce on the ground of neglect to provide suitable maintenance, she is not entitled to a divorce upon the evidence adduced, which shows that the home in which they live was paid for by the wife; that she has a monthly income of about \$125; that the husband has no property or income other than a monthly salary of about \$100; that he pays the meat bill, the laundry bill, the yard boy, the taxes and the premiums on certain insurance policies, which practically consume his entire salary.

Id.—*habitual intemperance.*

Where a wife sues her husband for a divorce on the ground of habitual intemperance and, while the evidence tends to show that the husband indulged in the use of intoxicating liquor to a considerable extent, but that it was not such a frequent indulgence to excess as to show the existence of a confirmed habit and inability to control his appetite, such use is not ground for divorce.

Id.—*evidence—preponderance—reasonable doubt.*

A suit for divorce is a civil case, and a libellant need only establish the grounds for a divorce by a clear preponderance of the evidence; the criminal law rule that guilt must be proved beyond a reasonable doubt being inapplicable where a spouse is charged with matrimonial misconduct.

Id.—*adultery.*

Under the circumstances as disclosed by the evidence the charge of adultery was proven.

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OPINION OF THE COURT BY DE BOLT, J.

On May 15, 1912, Rosalie Lyons filed her libel praying for an absolute divorce from her husband, Thomas Benjamin Lyons, alleging three separate grounds: (1) Extreme cruelty; (2) neglect to provide suitable maintenance; (3) habitual intemperance. On the same day Mr. Lyons filed his libel praying for an absolute divorce from Mrs. Lyons, alleging as a ground therefor the adultery of Mrs. Lyons with one Samuel Keliinoi.

The cases were tried together and the circuit judge finding that none of the allegations contained in Mrs. Lyons' libel were proven, except the jurisdictional facts, he prepared and entered a decree dismissing her libel. As to Mr. Lyons' libel the circuit judge found from the evidence adduced that the charge of adultery against Mrs. Lyons was sustained, and Mr. Lyons having expressed his desire for a divorce only from bed and board, the circuit judge prepared and entered a decree accordingly, and not for an absolute divorce.

Mrs. Lyons appealed from both decrees, which appeals will be considered together.

The parties were married on or about January 18, 1894, and continued to live together as husband and wife until on or about May 13, 1912, when they separated. At the time of their marriage Mrs. Lyons was about eighteen years of age and Mr. Lyons was about twenty-four years of age. They have resided since their marriage in Wailuku, Maui, except for a few months, when they resided in Hana, Maui. Nine children were born to them, six of whom—all boys—are living, and at the time the libels were filed they were aged, respectively, seventeen, fourteen, eleven, eight, seven, and three years. The two eldest had been in Honolulu for some time prior to the filing of the libels. One was working, taking care of himself, and the other was attending Kamehameha school.

The several grounds for divorce as alleged in the respective libels will be considered in the order above named:

1. Extreme cruelty. Actual personal violence was neither

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alleged nor sought to be proved. There was some evidence, however, tending to show that on one occasion Mr. Lyons pushed a heavy table towards Mrs. Lyons which she says would have struck her had she not got out of the way, and that on another occasion he told the Japanese girl, Koniko, who was living with the Lyons' family, that he would shoot Mrs. Lyons. Otherwise, the charge of extreme cruelty was sought to be established by evidence tending to show the use of vile and abusive language, including charges of adultery made in the presence of others, which charges, Mrs. Lyons claims, were false and malicious. There was evidence tending to show that on various occasions, while intoxicated, Mr. Lyons, in the presence of others, called Mrs. Lyons a whore and accused her of having committed adultery with several men, including Samuel Keliinui.

When asked as to Mr. Lyons' conduct towards her "as being kind or unkind," she said: "He has been all right as long as he did not drink. But when he started to drink he got to be very abusive. He insulted me,—he did not care who was at the house. He was very abusive. When he came home, he would not hesitate to call me all manner of names. He would abuse me and call me * * * a whore." When asked how long he had called her such names, she said: "He has always done it. As soon as he was under the influence of liquor he would call me those names." When asked as to the first time that he accused her of unfaithfulness, she said: "Years ago. Long years ago. He used to tell me that I was not true to him and I used to tell him: 'Of course I am.' Then he said: 'You are a damn liar.' I said: 'What have you heard? Have I done anything to show you that I am not true to you?' Then he'd say, 'I heard stories. I heard people talking about you.' I told him that if I was to believe everything that I heard about him we would have all kinds of trouble." When asked if he ever accused her of "unfaithfulness with any one man before the time he first accused you of being untrue to him and having relations with Sam Keliinui," she said: "Oh, yes, he did. He

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has accused me with several. He named several and one a negro." When asked if he ever made such accusations except when drunk, she said: "No. Only when he was drunk. When he was sober he was all right."

In answer to the question: "What effect if any have these accusations that he has made against you had upon your health?" she said: "I have been very miserable. It has made me very miserable. Many is the time that I have been unable to eat or sleep. Just worried me."

She does not say nor does the record show that these accusations had any injurious effect upon her health, or caused her any bodily injury, or created an apprehension of any bodily injury. "While drunkenness was no excuse for calling her vile names under any circumstances, yet the injurious effect thereof upon her mind," even though the accusations were groundless, "should not have been, and probably was not, so bad as if he had deliberately called her by those names when he was sober." *Waldron v. Waldron*, 9 L. R. A. 487, 491. However reprehensible the accusations may have been, under the circumstances of this case, they cannot be regarded as sufficient to establish extreme cruelty. "Cruelty is any conduct in one of the married parties which, to the reasonable apprehension of the other, or in fact, renders cohabitation physically unsafe, to a degree justifying a withdrawal therefrom." 1 Bish. Mar., Div. and Sep., §1431.

"The prevailing view seems to be that personal violence is not necessary, but that it is sufficient if the conduct is such as to impair the health or produce bodily injury or such as to create an apprehension of bodily injury. The usual test seems to be physical injury, but this may be actual or apprehended, and may be direct or indirect through mental suffering. Mental suffering is not generally deemed sufficient unless it is such as to impair the health, in other words, if mental suffering is sufficient, its test is generally that it impairs the health." *Bartlett v. Bartlett*, 13 Haw. 707, 708. See also *Bruns v. Bruns*,

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ante 284, 287; *Waldron v. Waldron*, 9 L. R. A. 487; *Robinson v. Robinson*, 15 L. R. A. 121; *Maddox v. Maddox*, 52 L. R. A. 628.

In view of the conclusion we have reached as to the charge of adultery contained in the libel filed by Mr. Lyons, we cannot say that the accusations made by him against his wife, before the filing of the libel, were made maliciously and without probable cause.

2. Neglect to provide suitable maintenance. The evidence adduced at the trial, as shown by the record before us, was not sufficient to sustain this charge. The evidence tends to show these facts: That the home in which Mr. and Mrs. Lyons had lived for a number of years next preceding the filing of the libels was paid for with Mrs. Lyons' money; that during the greater portion of the time mentioned she has had a monthly income of about \$125, which she has contributed towards the support of the family; that Mr. Lyons had no property at the time of the marriage and has acquired none since; that at the time of the marriage he was receiving a monthly salary of about seventy-five dollars, and during the time above mentioned has had no income other than a monthly salary of seventy-five to one hundred and twenty-five dollars; that he paid the meat bill, the laundry bill, the yard boy, the taxes and the premiums on certain insurance policies, which practically consumed his entire salary.

3. Habitual intemperance. We are not aware of any established legal definition of the words, "habitual intemperance," but for all practical purposes it would seem that to constitute habitual intemperance there must be such a frequent indulgence to excess as to show the existence of a confirmed habit, and an inability to control the appetite. 14 Cyc. 623; *Dennis v. Dennis*, 34 L. R. A. 449.

Mrs. Lyons testified that her husband drank intoxicating liquor almost every day during the whole of their married life; that during the last few years he has been drinking a little more

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than he did formerly; that she has seen him on two or three occasions unable to take care of himself.

Sam Keliinoi testified that during the two years next preceding the trial he had seen Mr. Lyons drunk thirty or forty times, and that he was unable on eight or ten of those occasions to take care of himself.

John V. Kerr testified that he had known Mr. Lyons thirty-five years; that he had seen him almost every day during the two years next preceding the trial and that he did not think he had seen him drunk during that time; that he was a very light drinker. "Probably there is not a man in the Islands that takes as small a drink as he does."

W. A. McKay, district magistrate of Wailuku, testified that he had known Mr. Lyons about thirty years; that he was not very intimately acquainted with him; that he saw him nearly every day, and that he had never seen him drunk.

While it may be conceded that Mr. Lyons indulged in the use of intoxicating liquor to a considerable extent, still, we cannot say that it was "such a frequent indulgence to excess as to show the existence of a confirmed habit," nor does the evidence show "an inability to control the appetite," if he had such appetite. It does not appear that his drinking ever caused him to be absent from his business or work, or occasioned him the loss of any position or employment, or caused any trouble between him and his employer, or disqualified him from attending to his business during the time usually devoted to business. We think it highly improbable for a man to habitually indulge to excess in the use of intoxicating liquor without suffering some loss to his business. Thus, in *Mahone v. Mahone*, 19 Cal. 627, 629, the court said: "If there is a fixed habit of drinking to excess to such a degree as to disqualify a person from attending to his business during the principal portion of the time usually devoted to business, it is habitual intemperance—although the person may at intervals be in a condition to attend to his business affairs."

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4. Adultery. The libel filed by Mr. Lyons alleges: "That at the home of the libellant at Wailuku, County of Maui, Territory of Hawaii, at divers and many times during the two years immediately prior to the 13th day of May, A. D. 1912, the exact dates being unknown to libellant, and particularly at divers and many times during the months of November and December, A. D. 1911, at said place, the particular dates being unknown to libellant, the said libellee, Rosalie Lyons, in utter disregard of the sanctity of the marriage state did commit adultery with one Samuel Keliinoi."

Samuel Keliinoi boarded with the Lyons family from July or August, 1910, until about the middle of April, 1912. He roomed elsewhere.

It appears that Mrs. Lydia Heine, whose deposition was taken in Honolulu and read at the trial, went from Honolulu to the Lyons home in Wailuku the last week in October, 1911, and remained there about two months. She testified that she saw Mrs. Lyons and Keliinoi kissing often; that they asked her not to say anything to any one, and to keep it as a secret, which she agreed to do; that she first saw them kissing in Honolulu, at her home, before she went to Wailuku; that they were very affectionate towards each other; that Mrs. Lyons told her there was a lot of difference between Keliinoi and Ben, because Ben was so cold toward her and Sam showed a great deal of affection toward her; that she saw them in bed together more than ten times, it may have been as many as fifteen times; that Keliinoi kept his pajamas there; that Mrs. Lyons told her to put them away for her so that Koniko would never see them, and that she did so put them away; that Mr. Lyons went to Honolulu on two occasions while she was at the Lyons' home; that during his absence on the first occasion she saw Keliinoi in Mrs. Lyons' bed room at night, but not very often; that during Mr. Lyons' second absence "most of the time he was sleeping with Mrs. Lyons. I can remember one special date that they were together in bed, which was during the water carnival

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at Puunene, and a dance also—that was December the 9th;” that a child was born to Mrs. Lyons on Wednesday, November 22, 1911, and was buried on Friday of the same week; that Keliinoini told her that it was “God’s wish that the child was taken away, because it bears a perfect picture of his little girl Pauahi;” that he said “if the child had lived, it would cause trouble in her home;” that he said the child was his; that he said he knew the child was his, because, during the time Mrs. Lyons was in Honolulu, he was with her quite often; that after her return to Honolulu she received a number of letters from Mrs. Lyons all of which she destroyed at the request of Mrs. Lyons, except two. In one of these, dated March 8, 1912, Mrs. Lyons says, referring to Koniko and some stories she had heard: “Lydia, I thought it could not be true and denied it right away, until I received a letter by the Mikahala last Wednesday that my poor girl has told a party or two that she left me on account of uncle Sam, as Ben threatened to shoot me, etc. Lydia, you know most of my secrets and if you love me a little bit, as I believe you do, ask Koniko to write to the father denying those stories should he ever hear it, for do you know that our home will be in ruins if such things come to uncle Ben’s ears. This will be the 1st and last favor I shall ever ask of you and Koniko to try and shield me no matter what the world does or says. * * * Lydia, I have seen the error of my ways and this cruel bitter lesson has shown me the only way and I shall profit by it. Whatever you do don’t throw me down.”

It appears that Mrs. Heine became incensed at something Mr. Keliinoini is supposed to have said derogatory of her character, whereupon she wrote him on March 6, 1912, saying, among other things, “if ever I get a nasty letter from any of you people I will certainly come out with things for I am very sore of such dirty talks.”

Keliinoini showed this letter to Mrs. Lyons, and on March 9, notwithstanding the fact that she had written Mrs. Heine the day before, she wrote her again as follows: “My dear Lydia:

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Uncle Sam just showed me your letter to him and your threat to tell all you know of his actions, even if bad friends were the results. My dear girl, I could not believe my eyes when I read those few lines, surely you cannot believe that Uncle Sam would tell such stories about you and a hack-driver, although to tell you the truth when we read about that accident in the papers he did mention that may be it was you, as he had heard a rumor about a hack-driver while in Honolulu; but as to accusing you of anything bad, Lydia, believe me, it is not true and he would be the very last to say such things of you. Whoever wrote you such a letter is no true friend of yours and of course if you have made up your mind to ruin my home and make me unhappy, I suppose I shall suffer, but believe me Lydia you never had a person who thought more of you, or who would do more for you in your troubles than I would and this is no lie. Of course those who would like to see me in trouble will invent any kind of story to you, so as to hear all you can say of us and about us, but Lydia, those are no true friends of you and if you would only tell them to mind their own business they'll catch on to themselves and stop trying to make trouble. I am not pleading my cause with you for myself, but for my little ones, those little ones who have learned to love you, and Lydia you are a mother, and no matter what my faults are my love is for my little ones. The day might come when you will be placed in the same cruel position as I am today, Heaven grant your mother-heart will never suffer as mine is as I write this. If it is bad friends you want to be with me there are other ways of doing it than breaking up my home, and causing me untold unhappiness. I have always tried to be a good and kind friend to you and no one knows it better than you do. Why strike at me through Sam and all because of some untrue story a false friend tells you. If I were to believe everything I hear then we would have been bad friends long ago. But Lydia, I trusted you then as I trust you now and simply will not believe. You do the same, my dear, it is the best policy.

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I can write no more. Do what you think best. Sam really has never talked about you as bad as they make out, in fact. I've tried to ask him questions and nothing doing. Uncle Ben is the only one who is wild and accuses everybody but it is not our fault, and drinking helps it along."

Rebecca Lum Lum, a girl between fifteen and sixteen years of age, testified that she lived for a time in the Lyons' home; that on one occasion, Mr. Lyons being in Honolulu, she saw Keliinoi between nine and ten o'clock at night in Mrs. Lyons' bed, partly covered up,—Mrs. Lyons being in the kitchen at the time; that on another occasion, Mr. Lyons being at work, between ten and eleven o'clock in the forenoon, she saw Keliinoi sitting on a trunk in the closet of Mrs. Lyons' bed room; that she saw Mrs. Lyons and Keliinoi kissing many times.

Mr. S. F. Chillingworth, a member of the bar of this court, testified that, shortly before the institution of these proceedings, in the course of a "wordy war" between Mr. and Mrs. Lyons, he "interfered" at the request of the husband and urged the wife to return to Wailuku and "resume their family relations," and that Mrs. Lyons replying said, "I will not go back—I will not give him up." He added that he had "been speaking of her suspected association with Mr. Keliinoi" and that "when she said 'him' it conveyed to my (his) mind Mr. Keliinoi;" and that "it could not possibly be Ben," the husband.

Counsel for Mrs. Lyons contends that the testimony of Mrs. Heine cannot be relied upon, urging in that respect that she was filled with spite, malice and anger towards Keliinoi. It does not appear, however, that she threatened to invent any story, or to tell what was not true, but on the contrary, to tell what she knew concerning Mrs. Lyons and Keliinoi. It is apparent that both Mrs. Lyons and Keliinoi so understood her letter. Mrs. Heine in her letter to Keliinoi does not even mention the name of Mrs. Lyons. Still, Mrs. Lyons did not hesitate to assume that Mrs. Heine referred to her as well as to Keliinoi. Hence, the letter of March 9. Mrs. Heine by rea-

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son of her anger cast aside the bond under which she had obligated herself not to divulge their secrets. It will be observed that Mrs. Lyons in her letters to Mrs. Heine, does not even intimate that Mrs. Heine had told her or was about to tell anything which was untrue. She pleads with Mrs. Heine with the single hope that she may prevail upon her not to draw aside the veil of secrecy.

Whatever probative force, if any, Mrs. Heine's testimony standing alone would be entitled to, we need not say. No fact, generally speaking, stands alone in the trial of any cause. A single fact may be absolutely meaningless in and of itself, but cogent in association with other facts.

Counsel urges upon the court the fact that both Mrs. Lyons and Keliinoi strenuously deny the charge of adultery. The denial has but little force viewed in the light of the chain of incriminating circumstances disclosed by the record before us. "The paramour is an admissible witness; but, being *particeps criminis*, his evidence is but weak." 2 Greenl. Ev. (14 ed.) §46. "The mere fact that the evidence is conflicting or that guilt is explicitly denied does not preclude a divorce for adultery." 14 Cyc. 692.

"The charge of adultery may be sufficiently proved by evidence of circumstances leading to an inference of guilt. It is impossible fully to indicate the circumstances which will lead to a conclusion, because they may be infinitely diversified by the situation and character of the parties, and by many other incidental matters which may be apparently slight and delicate in themselves but which may have most important bearings in the particular case. While the circumstances need not be such that an inference of guilt is the only possible conclusion, yet the facts must be such as to lead a just and reasonable man to the conclusion of guilt." 14 Cyc. 693, 694.

Lord Stowell, in the case of *Loveden v. Loveden*, 2 Hagg. Con. 2, 3, said: "It is a fundamental rule, that it is not necessary to prove the direct fact of adultery; because if it were

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otherwise, there is not one case in a hundred in which that proof would be attainable; it is very rarely, indeed, that the parties are surprised in the direct fact of adultery. In every case, almost, the fact is inferred from circumstances, that lead to it by fair inference as a necessary conclusion; and unless this were the case, and unless this were so held, no protection whatever could be given to marital rights. What are the circumstances which lead to such a conclusion cannot be laid down universally, though many of them, of a more obvious nature and of more frequent occurrence, are to be found in the ancient books; at the same time, it is impossible to indicate them universally, because they may be infinitely diversified by the situation and character of the parties, by the state of general manners, and by many other incidental circumstances, apparently slight and delicate in themselves, but which may have most important bearings in decisions upon the particular case. The only general rule that can be laid down upon this subject is, that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion; for it is not to lead a rash and intemperate judgment moving upon appearances, that are equally capable of two interpretations,—neither is it to be a matter of artificial reasoning, judging upon such things differently from what would strike the careful and cautious consideration of a discreet man. The facts are not of a technical nature: they are facts determinable upon common grounds of reason; and courts of justice would wander very much from their proper office of giving protection to the rights of mankind, if they let themselves loose to subtleties, and remote and artificial reasons upon such subjects. Upon such subjects the rational and the legal interpretation must be the same."

5. Counsel for Mrs. Lyons contends that adultery as a ground for divorce cannot be established by a mere preponderance of the evidence. He, therefore, invokes the criminal law rule that guilt must be proved beyond a reasonable doubt.

"The general rule is that in civil cases a charge of crime

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need not be proved beyond a reasonable doubt, and that a preponderance of evidence is sufficient." 17 Cyc. 756. A suit for divorce is a civil case. Hence, a libellant need only "establish the grounds for a divorce by a clear preponderance of evidence; the criminal law rule that guilt must be proved beyond a reasonable doubt being inapplicable where a spouse is charged with matrimonial misconduct." 14 Cyc. 687. See also *Allen v. Allen*, 101 N. Y. 658; *Lindley v. Lindley*, 68 Vt. 421; *Poertner v. Poertner*, 66 Wis. 644.

In holding that adultery in a divorce case may be shown by a preponderance of the evidence, we do not wish to be understood as intimating that the charge of adultery in this case was not established beyond a reasonable doubt.

6. Counsel for Mrs. Lyons also contends, quoting from his brief, "that the decree of separation entered by the circuit judge was without authority, unauthorized, erroneous and should be reversed." He then quotes as follows from section 2228, R. L.: "But if the party applying for a divorce shall not insist upon a divorce from the bond of matrimony, a divorce only from bed and board shall be granted, and the relations of the parties after such divorce shall be regulated by existing laws concerning separation." Then, continuing, he says: "Under this provision it is imperative that in order to be entitled to a decree of separation the evidence must show that the party applying is entitled to a divorce." The evidence adduced, in our judgment, was clearly sufficient to entitle Mr. Lyons to a divorce on the alleged ground of adultery. Hence, the circuit judge had power to enter a decree of separation.

7. The decree entered by the circuit judge in favor of Mr. Lyons was as follows: "That the libellant and the libellee be separated as to bed and board from the filing of this decree until the 18th day of January 1914, or until further order of the court; that no disposition or change of use or possession of their properties is made; that the wife, the libellee, is given the right, if she wishes, to with the said children use and occupy the large,

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main residence building fronting on Main street in Wailuku, Maui; and that the libellant, the husband and father, may have the use and benefit of the two small residence cottages facing on the back street behind the residence premises in Wailuku; that so far as is convenient and not improper intrusion both and each party may have free access to and be at home in all or any of the home properties and the grounds and yards on which they are situate and each have the fullest opportunities to associate with and be with their said children and that the children are not without further order of the court to be given exclusively to either parent and not to be taken from either of the parties but remain to all intents and purposes as one family with father and mother at the head of it in every respect except that the husband and wife are not to occupy the same table or the same bed; that the libellant as husband and father and the natural and legal head of the family shall have the right, power and duty to keep from each and all parts of said premises the said co-respondent, Samuel Keliinoi, and not to allow him thereon; and to in every way see, that persons of ill repute and who are objectionable on moral grounds are kept away from intercourse with the said wife and the said children; that for the support of the said children, the libellant shall pay to the clerk of this court on the 15th day of each calendar month the sum of fifty dollars which the clerk is to hand over to the libellee for such purpose; that neither parent is to dispute or interfere with the government of the other in the care and government in a proper way of their said children; that the costs of this suit be paid by libellant; that neither party do any act or use any language or sign to aggrieve, make angry or hurt the feelings of the other party; but if they speak to each other or attempt to have any verbal intercourse or dealings, they must do so kindly, politely, without attempt to stir up ill-feelings and start quarrels; that during said time neither party shall begin any quarrel or contention or controversy with or against the other, but shall be quiet and, as far as in them lies, peaceable and harmonious;

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that neither party shall talk against or complain against the other to any other people not of their family or to or with their neighbors, but refrain from discussing each other so as not to stir up hatred one of the other; that if either party violates the letter or the spirit of this decision, judgment and decree during said period, the other party may come to the court for its protection. This decree shall take effect on the 16th day of November, 1912."

The decree dismissing Mrs. Lyons' libel is affirmed.

With regard to the decree of separation we approve the conclusion that the parties be divorced from bed and board until January 18, 1914, and that Mr. Lyons shall pay to the clerk of the court on the 15th day of each calendar month the sum of fifty dollars, which the clerk shall pay over to Mrs. Lyons for the support of the children. We disapprove, however, of the other matters set forth in the decree, some of which are utterly impracticable and some being matters over which the court has no jurisdiction. Provision should be made for the custody of each of the children, the parent to whom such custody shall not be awarded to be permitted to visit such child or children at reasonable hours during the day time. Upon both parties having an opportunity to be heard we direct that a decree, in plain simple language, in the usual form be entered covering the three provisions above mentioned.

The decree of separation as entered is disaffirmed for the reasons stated, and the cause is remanded to the circuit judge with directions to reform the decree as entered, and for such further proceedings as may be necessary in conformity with this opinion.

R. P. Quarles for Mrs. Lyons.

Wade Warren Thayer for Mr. Lyons.

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H. ANAMI v. H. MIRIKIDANI.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED MARCH 5, 1913.

DECIDED MARCH 17, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

LANDLORD AND TENANT—*agreement to assign lease—covenant to repair.*

M, a lessee under a lease containing a covenant to repair, enters into a written agreement with N to assign the lease for \$250, payable in installments, and upon full payment being made, the assignment to be executed. N enters into possession of the premises by virtue of the agreement to assign, under the terms of which he is bound to observe the covenant to repair. For failure to repair, the landlord in an action for summary possession against M, recovers possession of the premises, whereupon N brings an action against M to recover the sum of \$150, being part of the purchase price, paid by him to M, pursuant to the agreement to assign. Held, the action cannot be maintained, the forfeiture and cancellation of the lease, with the consequent loss of possession to N, being, as the court assumes, the direct result of his own failure to observe the covenant to repair.

OPINION OF THE COURT BY DE BOLT, J.

This is a writ of error to the circuit court of the first circuit to review a judgment entered in an action of assumpsit, wherein H. Anami, the defendant in error, was the plaintiff and H. Mirikidani, the plaintiff in error, was the defendant. The action was brought by the plaintiff, Anami, to recover from the defendant, Mirikidani, the sum of one hundred and fifty dollars for money paid by the plaintiff to the defendant pursuant to a written agreement to assign a lease.

Trial was had and at the conclusion of the evidence the court directed a verdict for the plaintiff for the amount sued for and judgment was entered accordingly.

The record shows that on August 21, 1912, the plaintiff and the defendant entered into a written agreement whereby the defendant as the lessee of certain premises agreed to sell and

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assign and the plaintiff agreed to purchase the lease of the premises for the sum of two hundred and fifty dollars, of which purchase price, the sum of fifty dollars was paid before the execution of the agreement to assign and the remaining sum of two hundred dollars, according to the terms of the agreement to assign, was to be paid as follows: One hundred dollars on September 10, 1912, and one hundred dollars on September 30, 1912. The plaintiff, however, only made one of these payments, that of September 10, 1912, leaving one hundred dollars of the agreed purchase price unpaid.

The agreement to assign further provided that "When full payment shall have been received, said party of the first part" (Mirikidani) "agrees to execute and deliver to said party of the second part" (Anami) "an assignment of said lease. And the party of the second part hereby covenants and agrees with the party of the first part that he, the said party of the second part, will pay the rent reserved in said lease and will observe and perform all covenants in said lease contained on the part of the lessee to be kept and performed and will save and hold harmless and indemnify said party of the first part against all loss or damage which he may sustain by reason of any failure on the part of said party of the second part to observe and keep all covenants in said lease contained on the part of the lessee to be kept and performed. In case of forfeiture, the said party of the second part will surrender this contract upon demand and allow the said party of the first part to take immediate possession of said premises together with all improvements thereupon without recourse to law."

Among the covenants contained in the lease, on the part of the lessee to be kept and performed, were the covenants "that he will not, without the consent in writing of the" landlord, "assign this lease," and "that he will, at his own cost and expense, during said term, keep and maintain said premises and all buildings, fences and additions thereto in good and substantial repair and condition."

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The record further shows that upon the execution of the agreement to assign the plaintiff went into possession of the premises; that he remained in possession about one month; that he collected the accruing rents, amounting to about sixty-two dollars; that he paid sixty dollars, one month's rent for the premises, presumably to the landlord.

The theory upon which the plaintiff proceeded in the court below, and which the trial court adopted as the correct theory, was, that because the landlord would not consent to the execution of the formal assignment of the lease, the agreement to assign could not be carried out, and hence, it was not incumbent upon him to perform the covenants of the lease, and that he was entitled to recover the money paid by him to the defendant pursuant to the agreement to assign.

In opposition to the plaintiff's theory the defendant, at the trial, made the following offers of proof, which the court rejected, namely: (1) That prior to the execution of the agreement to assign, and after the price had been agreed upon, it was discovered by the plaintiff that the premises were in bad repair, and that the purchase price was reduced on the understanding that certain repairs should be made by the plaintiff, and thereafter kept in repair by him at his own expense according to the covenants of the lease; (2) that on September 17, 1912, the landlord notified the defendant in writing that he, the defendant, had failed to keep the covenant to repair, and that he, the landlord, had elected to determine the lease and demanded immediate possession; (3) that upon receipt by the defendant of the notice to repair he informed the plaintiff thereof and requested him to place the premises in good repair in accordance with the terms of the lease which had been assumed by him; (4) that the plaintiff failed, neglected and refused to put the premises in good repair; (5) that on or about September 28, 1912, in the district court of Honolulu, for failure to repair, judgment was rendered in favor of the landlord and against the defendant for the summary possession of the

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premises, and that a writ of possession issued thereon; (6) that the plaintiff was notified of the pendency of the suit for summary possession.

The errors assigned by the defendant are: That the court erred in rejecting each of the six offers of proof made by him; that the court erred in directing a verdict for the plaintiff; that the judgment entered was and is contrary to the law.

In the view we take of the case the court committed prejudicial error in rejecting the offers of proof and in directing a verdict for the plaintiff. It follows that the judgment entered must be reversed.

Not only did the plaintiff take possession of the premises upon the execution of the agreement to assign, but the agreement itself contemplated that he was to have immediate possession. Thus, to all intents and purposes the plaintiff was in possession as assignee as between himself and the defendant, which possession consummated his obligation, as well as his liability, to the defendant to keep and to perform the covenants of the lease.

Assuming the facts to be as suggested by the offers of proof, the forfeiture and cancellation of the lease, with the consequent loss of possession to the plaintiff, being the direct result of his own failure to observe the covenant to repair, he is not entitled to recover against the defendant. If the facts are as the defendant claims, to permit the plaintiff to recover against him for the money paid pursuant to the terms of the agreement to assign, would be permitting the plaintiff to profit by his own wrong.

It does not appear that the landlord objected to the possession of the premises by the plaintiff, or that he would not have given his consent to the assignment of the lease at the proper time, if the covenant to repair had been kept. He, apparently, acquiesced in the possession by the plaintiff, objecting only to the failure to repair. Thus viewing the case, it is apparent that the inability of the defendant to execute the formal assign-

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ment of the lease was not brought about by a refusal of the landlord to consent thereto, but by the failure of the plaintiff to live up to his agreement to observe the covenant to repair as contained in the lease, which failure on his part, if true, resulted in the forfeiture and cancellation of the lease, thereby depriving the defendant of all power to make the formal assignment.

The verdict therefore is set aside, the judgment entered thereon reversed, and a new trial granted. The cause is remanded for such further proceedings as may be proper.

Lorrin Andrews and Eugene Murphy for plaintiff.

J. Lightfoot for defendant.

M. F. SCOTT v. HAWAIIAN TOBACCO PLANTATION,
LIMITED.

EXCEPTIONS FROM CIRCUIT COURT, THIRD CIRCUIT.

ARGUED MARCH 12, 1913.

DECIDED MARCH 26, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

ACCOUNT STATED—*definition—promise to pay.*

An account stated is an agreement between persons who have had previous transactions, fixing the amount due in respect of such transactions. It is an acknowledgment of an existing condition of liability between the parties. From it the law implies a promise to pay whatever balance is thus acknowledged to be due.

EVIDENCE—*mere scintilla insufficient.*

A mere scintilla of evidence is insufficient to support a finding of fact.

CORPORATIONS—*acts and admissions of agents.*

The acts and admissions of the agent of a corporation when acting within the scope of his authority are the acts and admissions of the corporation.

ID.—*authority of manager—account stated.*

The manager of a tobacco plantation owned by a corporation, who is authorized to direct all of its industrial operations and

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makes purchases for the corporation, has charge of all the laborers, makes contracts for clearing and cultivation, adjusts the amounts due to the laborers and contractors and directs the payments for labor and materials, has authority to enter into an account stated showing the amount due to a contractor.

OPINION OF THE COURT BY PERRY, J.

This is an action of assumpsit for \$260 for labor performed in clearing 5 1/5 acres of land. It was commenced in the names of Chris Carcani and George H. Constantine who furnished the labor. M. F. Scott, to whom the claim was assigned, was later substituted as party plaintiff. In the declaration as amended there are two counts, the first upon an express contract to pay for the labor at the rate of \$50 per acre and the second upon an account stated.

By admissions of the defendant and by undisputed evidence it is shown beyond any doubt that the defendant is a corporation with its head office in Honolulu, Oahu, that the labor was by the plaintiff's assignors performed for the defendant as alleged, that the reasonable value of the labor is \$50 per acre or \$260 in all and that the amount remains wholly due and unpaid, although payment was requested. No defense on the merits was presented and apparently there is none. If the plaintiff had included in his declaration a count on a *quantum meruit*, there could be no hesitation in rendering judgment for the plaintiff and in sustaining the judgment. The only apparent difficulty lies in the fact that there is no evidence to sustain a finding of an express contract and that the proof of the account stated is claimed to be defective and insufficient.

From undisputed evidence it appears that plaintiff's assignors performed the labor in question in 1909 and 1910; that at that time one Peck was the manager of the plantation; that on June 10, 1910, one Schrader succeeded Peck as manager and continued to hold that office until and including the time of the trial of the case at bar; that on several occasions after Schrader

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became manager Carcani, acting for Constantine as well as on his own behalf, requested of Schrader payment for the clearing done by them; that the corporation was financially embarrassed and in arrears in the payment of its manager and laborers and that Schrader suggested to Carcani that he attempt to procure payment from the officers in Honolulu; that Carcani declined to do so; that subsequently Schrader, after measuring the land cleared and making an investigation into the facts concerning the performance of the labor and its value, was fully satisfied that the land was $5 \frac{1}{5}$ acres in area, that the labor was performed as claimed and that its reasonable value was \$50 per acre or \$260 in all; and that on February 6, 1912, Schrader at Carcani's request gave him a document signed by himself on behalf of the corporation and reading as follows: "Statement of Account due Chris. Carcani and Geo. H. Constantine for clearing land in 1909 and 1910. By clearing of guavas, root and branch, clearing and placing in shape for cultivation ($5 \frac{1}{20}$) five and one twentieth Acres of land @ \$50.00 per A. \$260.00. Correct: Hawaiian Tobacco Plantation Ltd., by Wm. B. Schrader Mgr." From the evidence it is clear that the error on the face of the instrument was in the statement of the area and not in that of the amount.

It is claimed by the defendant that this document, by reason both of its language and of the circumstances leading up to and surrounding its execution and delivery is not an account stated; and also that Schrader was without authority to bind the corporation in the matter.

"An account stated is an agreement between persons who have had previous transactions, fixing the amount due in respect of such transactions." 1 Cyc. 364. It is "an acknowledgment of an existing condition of liability between the parties. From it the law implies a promise to pay whatever balance is thus acknowledged to be due." *Chace v. Trafford*, 116 Mass. 529. "An admission of an indebtedness in a specified sum is sufficient to constitute a claim an account stated." *Ware v. Man-*

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ning, 5 So. (Ala.) 682. "The acknowledgment by defendant that a certain sum is due creates an implied promise to pay. * * * It is the consent of the defendant to the balance claimed that imparts to it the character of an account stated." *McCall v. Nave*, 52 Miss. 495. The paper above quoted clearly complies in form with these requirements. It is described on its face as being a "statement of account due" the plaintiff's assignors "for clearing land in 1909 and 1910," sets forth their claim to be "by clearing of guavas, root and branch, clearing and placing in shape for cultivation (5 1/20) five and one twentieth acres of land @ \$50.00 per A. \$260" and in the one word "correct" unmistakably notes the defendant's acknowledgment over its signature of the correctness of the claim. The circumstances relied upon to deprive the document of the character of an account stated are that, as it is claimed, Schrader did not intend it to be an admission of the amount due but merely of the fact that the work had been done and that Carcani did not agree that \$260 was the amount due and that therefore the minds of the parties did not meet. Concerning the latter point Schrader testified that at the time of the delivery of the paper Carcani did not open it or read it, but he also testified that this was due to the fact that Carcani "had the utmost confidence in me, I says, here are the accounts and I don't remember him looking at it at all, simply took them and thanked me, said 'you have helped me out a great deal,' because he had the utmost confidence in me that I had made it out correctly, as I understood it," and to the court's question, "Then if I correctly understand you, Mr. Schrader, you say that the best of your recollection is that, while you are not absolutely sure, you had previous to the time of giving this paper mentioned to Carcani the sum of \$260, and this was merely following out that previous conversation?" answered: "Yes, sir, in fact in addition to that I would like to say that he left it entirely to my honor, as he put it, to put a figure on his work." There is nothing in the evidence to justify a finding that Carcani ever objected to the

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sum of \$260 as the amount due. On the contrary, the irresistible inference from the evidence is that at all times, after Schrader measured the land and otherwise investigated the facts, Schrader and Carcani were in entire accord upon the ultimate fact that the sum due was \$260. Six days after the statement was delivered, Carcani and Constantine commenced this action naming \$260 as the amount due. Not unmindful of the well established rule that this court cannot, in an action at law, disturb findings of fact based upon substantial evidence, we think that the only finding possible upon the evidence is that in delivering and receiving the paper in question, the parties agreed upon \$260 as the amount due.

It is true that Schrader testified, "When I made out this statement it was practically merely a statement of fact that they had cleared the land, that I knew they had cleared it" and "I didn't want to make out that paper because I knew that I knew nothing about it except the mere fact that they cleared the land," but the facts remain that he did make out the paper, that he did so voluntarily, that he wrote, in addition to the statement of the performance of the work, that the correct sum due was \$260 and that the corporation so acknowledged and that he also testified: "I inquired from 2 or 3 parties what was a fair price to clear land and they made the remark that so and so,—some land requires a little more money than some others, and I took that" (\$50 per acre) "as a fair price for that land, because I had about thirty acres cleared and I took their view," (meaning the view of Carcani and Constantine) "heavy guava, heavy roots, was a fair price." Other evidence by Schrader was to the same effect. While the question is a close one, we think, in view of the language of the document signed by Schrader and of all of the other evidence, that the statement that he intended merely to certify that the land had been cleared must be regarded as a mere scintilla of evidence and that the finding that the paper was not an account stated is unsupported by evidence.

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As to Schrader's authority. It sufficiently appears from the evidence that the corporation was engaged in conducting on the Island of Hawaii a plantation for the cultivation of tobacco and that Schrader as manager directed all of its industrial operations on the plantation, made purchases for the corporation, had charge of all the laborers, made contracts for cultivation, and adjusted the amounts due to the laborers and contractors and directed the payments for labor and materials. This accords with the facts judicially known by the court as ordinarily existing on plantations in this Territory owned by corporations whose actual operations on the field are superintended by a manager. In *Kilauea S. Co. v. Macfie*, 5 Haw. 3, 8, this court in 1883 said: "The duties of a manager of a sugar plantation are well known. He has charge of all the laborers and makes the contracts with them and directs all the operations of planting, harvesting and grinding the cane." Since that time corporations engaged in agricultural enterprises have increased largely in numbers and their course of business, with reference to the powers and duties vested in their managers has, it is well known, been the same as that recognized in the case just referred to. The operations and method of management of a tobacco plantation are necessarily similar. A corporation can speak only through the medium of agents. 4 *Thomp. Corporations*, §4915. And it is a well settled rule of law that "the acts and admissions of the agent of a corporation when acting within the scope of his authority are the acts and admissions of the corporation." *Hackfeld v. Grossman*, 13 Haw. 725. No attempt was made by defendant to show that the manager in this instance did not possess the ordinary powers of a manager similarly situated. Mr. Schrader had authority to enter into a contract for the clearing of land and likewise was authorized to adjust the amount due for the labor furnished and to enter into an account stated showing the amount due. It is immaterial that the labor was furnished during the incumbency of Schrader's

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predecessor in office. The same power of settling the amount due continued in the succeeding manager.

The exceptions are sustained, the judgment set aside and a new trial granted.

Plaintiff in person.

J. W. Russell (*Thompson, Wilder, Watson & Lymer* on the brief) for defendant.

HENRY C. HAPAI, G. W. A. HAPAI AND NELSON K. SNIFFEN *v.* MAY K. BROWN, ARTHUR M. BROWN, HER HUSBAND, BLANCHE WALKER, JOHN WALKER, HER HUSBAND, WALTER F. DILLINGHAM, ROBERT W. ATKINSON, AND HENRY WATERHOUSE TRUST COMPANY, LIMITED, A CORPORATION.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

ARGUED MARCH 4, 1913.

DECIDED MARCH 28, 1913.

ROBERTSON, C.J., PERRY, J., AND CIRCUIT JUDGE WHITNEY
IN PLACE OF DE BOLT, J.

EVIDENCE—judicial notice—Hawaiian language.

In this jurisdiction the Hawaiian language is not to be regarded as a foreign language, but as one of which the courts and judges must take judicial notice, and in rendering into English a will written in the Hawaiian language the courts and judges are at liberty to use their own knowledge of the Hawaiian language and may resort for assistance to such trustworthy sources of information as they may deem advisable, or to which their attention may be directed.

WILLS—construction of—irreconcilable clauses.

Where in a will two clauses are found to be in irreconcilable conflict the later will generally prevail over the earlier unless thereby the manifest intent of the testator gathered from the will as a whole would be defeated.

Hapai v. Brown, 21 Haw. 499.

SAME—devise of income, rents and profits of land.

A gift of the income or the rents, issues and profits of property is to be construed as a gift of the property itself unless from some language in the will it appears that the testator intended something different.

OPINION OF THE COURT BY ROBERTSON, C.J.

The plaintiffs-in-error, who were also plaintiffs below, claiming to own in fee simple certain undivided interests in the ahupuaa of Kaonoulu, on the island of Maui, in common with the defendants, which claims of ownership were denied by the defendants, brought an action to quiet their title in said land. The venue was changed to the first judicial circuit, and trial by jury was waived.

The plaintiffs as well as the defendants claim through one Keaka, whose will was proved and admitted to probate on December 15, 1868. The will was received in evidence upon the plaintiffs' offer, and the defendants then moved for judgment in their favor on the ground that one Paakuku was made the sole devisee, and the plaintiffs, who it is admitted do not claim through Paakuku, but through her brothers and sisters, could show no title in the land and, therefore, could not maintain the action. The motion was granted and judgment entered for the defendants.

Keaka's will was written in the Hawaiian language and the plaintiffs put in evidence a translation of it in the English language which had been prepared by one of the regular interpreters of the court. The trial judge adopted the translation except in one respect and that is indicated herein by the italicization of three words. The will, according to the translation finally adopted by the trial judge, is as follows:

"By the gracious favor of the King Kamehameha III whom God appointed to reign, his generous gift to his own people of land of them to bequeath, that is to say the Konohikis.

"I, Keaka, the undersigned, do hereby devise the land of Kaonoulu, from the mountain to the sea unto my heirs hereafter as follows:

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"Paakuku shall remain upon the land of Kaonoulu and have charge of it and the regulation of it as I have done on the said land. Her brothers and sisters are to live on the land under Paakuku as they have lived under me. No one of them shall oppose or deny the one I have *given the inheritance*, and everything pertaining to the land is to be had by the consent of the one I have appointed to have charge in my place. Let the younger brothers and sisters live under her pleasantly without evil thoughts which shall obstruct their living on the land.

"B. F. Sniffen shall not have the regulation of the land of Kaonoulu. I hereby forbid him acting as agent on said land. Let him live on his place and plant but under his wife in order that they may live comfortably on said land and let each cultivate as they may choose. The land of Kalihi, Oahu, and the appurtenances on that land of ours, it shall be for Paakuku and her brothers and sisters to have charge of and regulate.

"The horses, the two horses, Punalua and Manaihoolako, they shall be Paakuku's and her brothers and sisters and their heirs after them if the increase shall be sufficient to give them one horse apiece. They shall equally ride the horses until such time as there shall be one apiece.

"All the income of these lands and the Konohiki lands on these lands shall go to Paakuku and her brothers and sisters and their heirs after them.

"In witness of the foregoing I hereby affix my name, this 12th day of February, A. D. 1850 at Kalepolepo, Island of Maui, Hawaiian Islands."

There was some controversy in the court below as to the proper translation of the sentence in which the words above italicized occur. In the original will the sentence reads, "*Aole hiki i kekahi o lakou ke kue, a hoole i ka mea a'u i haawi ai i ka hooilina,*" and the translation offered by the plaintiffs rendered it as "No one of them shall oppose or deny the one I have appointed as the heir." The defendants contend that the translation adopted by the court below must be regarded as a finding of fact resting upon substantial evidence and that as such it is binding on this court. It appears that the trial judge, acting of his own motion, but with the concurrence of counsel, called the interpreter who had made the translation for the plaintiffs

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and examined him with reference to the matter of the proper translation of the words referred to, and the interpreter stated that he desired to modify his translation by substituting the words "given the inheritance" for "appointed as the heir." Another interpreter and two experts in the Hawaiian language were called and examined as witnesses in like manner as the first interpreter. The testimony of the witnesses, taken as a whole, tends to show that the Hawaiian words, "ka mea a'u i haawi ai i ka hooilina" are capable of being rendered either as "the one I have given the inheritance" or as "the one I have appointed as the heir." And if the question of the proper interpretation of the Hawaiian language into English is one of fact which depends on evidence the contention of counsel for the defendants would be correct. But, we hold, in this jurisdiction the Hawaiian language is not to be regarded as a foreign language, but as one of which the courts and judges must take judicial notice. In *John Ii Estate v. Judd*, 13 Haw. 319, 325, this court said, "We believe, however, the true rule to be that our courts take judicial notice of the ordinary, usual and well known meaning of Hawaiian words—words which have not acquired some unusual or technical signification in some trade or occupation or otherwise—and that, therefore, the court below was, and we are at liberty to consult standard dictionaries or other authorities in aid of its and our memory and understanding as to the meaning of the words under consideration." Such necessarily was the view entertained by the courts prior to the annexation of these islands by the United States, and, as shown by the above quotation, it has been maintained since the country became a Territory of the United States. We think the matter rests upon the same principle as that which requires our courts to take judicial notice of the laws and the principal facts of the history of Hawaii prior to the annexation of the islands. See *In re Title of Pa Pelekane*, ante, 175, 187. The question, what is the English meaning of a certain instrument written in the Hawaiian language is one of fact, but a fact of

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which the court will take judicial notice. In rendering the language of this will into English the trial judge was at liberty to use his own knowledge of the Hawaiian language and also to call to his assistance the official interpreters of the court and, if it was deemed advisable, other experts. That counsel were permitted to examine these interpreters and other experts in open court did not alter the situation. This court, likewise, must determine for itself the meaning of this will, and in translating the Hawaiian words into English, we are at liberty to resort, if necessary or convenient, to such trustworthy sources of information as may be deemed expedient, or to which our attention may be directed.

We think the sentence about which the dispute centered is properly translated as "No one of them shall oppose or deny the one I have given the inheritance." This rendition gives the words "haawi" and "hooilina" what may be regarded as their primary signification (though the latter word probably is more often used as the equivalent of "heir"), and it accords quite as well with the rest of the paragraph in which the sentence occurs as the translation first made by the interpreter. There were some inaccuracies, however, in the translation of the paragraph immediately preceding the attestation clause. That paragraph, in the original will, reads "O ka waiwai apau i loa mai no keia mau aina elua, a me na Poalima, maluna oia mau aina, e pili no ia mau pono ia Paakuku a me kona mau hoahanau, a me ko lakou mau hooilina mahope aku," and its proper rendition into English would be, "All the income from these two lands, including the Poalima (patches) on those lands shall belong to Paakuku and her relatives and their heirs thereafter." The word "hoahanau" ordinarily means "relative" or "kindred," and in this case it would, of course, include Paakuku's brothers and sisters. Possibly it should be limited to the brothers and sisters in this case. As to that we need not say at this time. The word "waiwai" is a term of wide application meaning "property," and as used in this will may very

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properly be regarded as the Hawaiian equivalent for the English phrase "rents, issues and profits."

The provisions of the will which refer to the land in dispute are, (1) the devise to the "heirs" of the testatrix "hereafter as follows;" (2) those providing that Paakuku should remain on the land and have "the charge and regulation" of it as the testatrix had had, the other children to live on the land under Paakuku as they had lived under the testatrix, that they should live there without "evil thoughts" and should not "oppose or deny" the one to whom had been given "the inheritance," that everything pertaining to the land should be had by Paakuku's consent; and that each may cultivate the land "as they may choose;" and (3) the final provision bequeathing the income and profits of the land to Paakuku and her relatives and their respective heirs.

Counsel for the defendants contend that the will taken as a whole, and particularly the language of the second paragraph above referred to, discloses an intent on the part of the testatrix to give the land in fee simple to Paakuku, for, it is argued, Paakuku could not take charge of the land as the testatrix had done, nor could Paakuku's brothers and sisters live under her as they had lived under the testatrix unless Paakuku was given the fee simple title. Much stress is laid on what it is argued is clear, that is that "the right of the brothers and sisters to live on the land is subject to the say so of Paakuku."

The plaintiffs rely on the last paragraph of the will which, they claim, is in harmony with the first provision and constitutes a devise to Paakuku and her brothers and sisters in fee as tenants in common. Their counsel contend that the most that can be made of the intermediate paragraphs is that their provisions were intended to constitute Paakuku a trustee of the land for the benefit of herself and her brothers and sisters, but that if those provisions should be found to conflict with the final clause they must yield to it. The dictum of Chief Justice Allen in *Kahawai v. Paakuku*, 6 Haw. 124, referring to this

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will and quoting the last clause, that "It was undoubtedly the intent of the testator that they (Paakuku and her brothers and sisters) should all have an interest in the property," also is invoked.

It is perfectly well settled that in order to ascertain the intent of a testator the will is to be considered as a whole; that effect should be given to every clause and every word, if possible; that provisions which are in apparent conflict must be reconciled, if possible; and that in case two clauses are found to be in irreconcilable conflict the later shall prevail over the earlier unless it would defeat the manifest intent of the testator gathered from the will as a whole.

A gift of the income or the rents, issues and profits of property is to be construed as a gift of the property itself unless from some language in the will it appears that the testator intended something different. *France's Estate*, 75 Pa. St. 220, 224; *Davis v. Williams*, 85 Tenn. 646, 651; *Passman v. Guarantee Trust etc. Co.*, 57 N. J. E. 273, 276; *Mettler v. Warner*, 243 Ill. 600, 611; *Greene v. Wilbur*, 15 R. I. 251, 255; *Walker v. Hill*, 73 N. H. 254, 256. To hold that Paakuku was the sole devisee of the land would be to ignore the words "and her relatives and their heirs" contained in the final paragraph. The somewhat ambiguous provisions of the second paragraph are not such as should prevent the final paragraph from being given the usual construction and effect of such a provision. The testatrix probably thought that in creating the tenancy in common it was competent for her to designate one of the children as the head of the family with certain authority over the others; but the rights in and to the land which the language of the second paragraph, if given full effect, would give to Paakuku were utterly inconsistent with the equality of interest given to Paakuku's relatives by the final paragraph, and being ineffectual, as we have found, to qualify the devise contained in that paragraph, the earlier inconsistent provisions must be held to be inoperative. The first and last clauses are in harmony, and

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they prevent the construction contended for by the defendants.

The judgment of the circuit court is reversed and the cause remanded for further proceedings.

Lorrin Andrews for H. C. Hapai and G. W. A. Hapai.

R. P. Quarles for N. K. Sniffen.

A. A. Wilder (Thompson, Wilder, Watson & Lymer on the brief) for defendants.

MAURICE R. CAREY v. HAWAIIAN LUMBER MILLS, LIMITED, A CORPORATION, AND I. YAMAMOTO, T. KOMATSU, T. MITO, Y. YAMAMOTO, T. KAJITA, N. TAKEI, M. MURAKAMI, K. TASHIRO, A. MURAWAKA, T. MITAMURA AND K. NARITA.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED MARCH 18, 1913.

DECIDED MARCH 28, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

APPEAL AND ERROR—*second appeal—record.*

A previous appeal having been taken in the same cause, it is not necessary on a second appeal to duplicate the copy of the record of the lower court already on file in this court, which copy, together with a copy from the lower court of so much of the proceedings as have taken place since the cause was remanded on the first appeal, make a complete record.

EQUITY—*practice—cause remanded for further proceedings.*

The complainant, a judgment creditor of a corporation, having filed his bill to reach unpaid subscriptions to the capital stock of the corporation in satisfaction of his judgment, execution having been returned *nulla bona*, and the trial judge declining to admit the judgment in evidence, the complainant rests and the respondents also rest without putting on any evidence, whereupon a decree is entered dismissing the bill. The complainant appeals and the decree is reversed and the cause remanded with instructions to the trial judge "to receive the judgment in evidence and for such

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further proceedings as may be proper," which instruction, in effect, is a direction to the trial judge to resume the hearing at the point where the judgment was offered in evidence and, not only to receive the judgment in evidence, but to proceed according as law and justice might require, the case being reopened for the respondents as well as for the complainant.

EVIDENCE—presumptions as to continuity.

It is a rule of evidence that where the existence of a fact, condition, or state of things is once established, the law presumes that such fact, condition or state of things, continues to exist as before, until the contrary is shown, or a different presumption is raised. Thus, the original corporators and stockholders of a corporation are presumed to continue the same as when the corporation was organized, and such presumption will so continue until the contrary is shown, or a different presumption is raised.

OPINION OF THE COURT BY DE BOLT, J.

The complainant, Maurice R. Carey, a judgment creditor of the corporation respondent, filed his bill in equity to reach the unpaid subscriptions to the capital stock of the corporation in satisfaction of his judgment against the corporation, execution thereon having been returned *nulla bona*.

This is the second appeal in this case. The first appeal was by the complainant; the present appeal is by the respondents. At the first hearing in this case the circuit judge declined to admit the judgment above referred to in evidence, and the complainant adduced no other evidence, except the articles of incorporation showing the corporate existence of the respondent, the Hawaiian Lumber Mills, Limited, as well as the number and par value of the shares of the capital stock, the names of the subscribers for such shares, the number of shares subscribed for, and the amount paid in on each share, and the respondents having rested without putting on any evidence, a decree was entered dismissing the bill. The complainant appealed and the decree was reversed and the cause remanded to the circuit judge with instructions "to receive the judgment in evidence and for such further proceedings as may be proper." Ante 311, 313.

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Thus, pursuant to the mandate of this court and upon motion by the complainant, the cause was again set for further hearing before the circuit judge, whereupon the complainant offered and the court admitted in evidence the judgment referred to and he thereupon rested and moved for a decree, contending that the respondents were not entitled to offer any evidence in defense, they having rested at the former hearing, thereby waiving, as he contends, their right to adduce any evidence or to make any further defense. The circuit judge accepted this view of the case, refused to permit the respondents to adduce any evidence in defense and entered a decree for the complainant, from which decree the respondents have appealed.

Counsel for the complainant in their brief, preliminary to the consideration of the appeal on its merits, claim that the respondents have failed to bring to this court a copy of the record and urge that the appeal will have to be dismissed. They have not, however, filed a motion to dismiss, but we have examined the question thus suggested in the brief and find the record complete. The record now before us and upon which the present appeal is prosecuted consists of a certified transcript of all the pleadings and papers filed and proceedings had in the lower court and used in the former appeal, together with a certified transcript from the lower court of so much of the proceedings as have taken place since the cause was remanded. The record thus viewed is not only complete, but fulfills the jurisdictional requirements. The appeals were merely successive steps to a final conclusion in the same case. To have inserted in the record in the present appeal a duplication of the matter which preceded the remanding of the cause and which was used on the former appeal would have been not only unnecessary, but a useless expense and wholly improper. *Cox v. Osburn*, 8 Ky. 191; *Nashua & Lowell R. Corp. v. Boston & Lowell R. Corp.*, 61 Fed. 237, 242; *Succession of Bothick*, 34 So. 163, 164; *Warren v. Fredericks*, 18 S. W. 750; *Harrison v. Creditors*, 9 So. 15, 16.

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The complainant, in support of his contention that the respondents by resting waived their right to put on any evidence, or to make any further defense, cites *Territory v. McCandless*, 16 Haw. 728; *Texeira v. Amer. D. G. Association*, 17 Haw. 41, and *Estate of Keaho*, 17 Haw. 308. In each of those cases the court merely held that dismissing a bill at the close of the complainant's case before the respondent presents or rests his case was not correct practice in equity. The cases are clearly distinguishable from the case at bar. Assuming, however, that where, as in each of the cases cited by counsel, after the court has afforded the complainant full and ample opportunity to present his case on its merits, the respondent by resting waives his right to put in any evidence, or to make any further defense, it does not follow, however, that a respondent waives that right by resting his case under circumstances such as are disclosed by the record before us.

It is apparent that at no time, either in the court below or in this court, has the case at bar been considered upon its merits. Upon the first appeal the only question submitted for consideration was, whether the judgment should be admitted in evidence or not. Having determined that question in the affirmative the cause was accordingly remanded with instructions "to receive the judgment in evidence" and for "such further proceedings as may be proper." Both upon authority and reason it is clear that the reversal of the decree left the case in the same posture as if no decree had been entered. The remanding of the case under the circumstances disclosed by the record was not, however, equivalent to the granting of a new trial, or a rehearing, but merely a continuation of a trial already begun. The circuit judge, in effect, was directed to resume the hearing at the point where the judgment was offered in evidence and to proceed with the trial according as law and justice might require, and to receive any competent and material evidence offered by either party to the end that a just and proper decree be entered disposing of the case upon its merits.

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This view necessarily and properly contemplated the reopening of the case for the respondents as well as for the complainant, thus permitting them to proceed as if there had been no appeal, and as they might be advised. *Hawkins v. Cleveland C. Co. & St. L. Ry. Co.*, 99 Fed. 322, 324; *District of Columbia v. McBlair*, 124 U. S. 320, 330; 3 Cyc. 486; 1 Beach Mod. Eq. Pr. §549.

As a general rule, in equity, where a cause is remanded in general terms, and no specific instructions are given, the matter is left more or less to the sound judicial discretion of the trial judge; but this general rule, in a case like the one at bar, will not permit a remand "for such further proceedings as may be proper," to be wholly disregarded. *Gray v. Regan*, 37 Ia. 688; *Kershman v. Swehla*, 62 Ia. 654. "It is not uncommon for courts to allow a party, either plaintiff or defendant, to withdraw a rest and proceed with further evidence." *Hoagland v. Stewart*, 98 N W. 428, 429.

The respondents further contend that they are not only entitled to the reversal of the decree but also to a direction that the bill be dismissed for failure of proof. While we agree with the respondents that the decree will have to be reversed we cannot accept their view that the bill should be dismissed. Upon proof of the corporate existence of the Hawaiian Lumber Mills, Limited, and of the names of the stockholders, the number of shares subscribed for by each, the amount due and unpaid on each share, together with the judgment and execution issued thereon and returned unsatisfied, the complainant made out a *prima facie* case against the respondents. While the respondents admit that the articles of incorporation may be evidence of the identity of the original incorporators, officials and stockholders at the time of the incorporation, they contend, however, that the book required to be kept by section 2548, R. L., "for registering the names of all persons who are or shall become stockholders of the corporation and showing the number of shares of stock held by them respectively, and the time when they re-

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spectively became the owners of such shares," constitutes the only *prima facie* evidence of ownership of the shares of stock.

It is a rule of evidence that where the existence of a fact, condition or state of things is once established, the law presumes that such fact, condition, or state of things, continues to exist as before, until the contrary is shown, or a different presumption is raised. 1 Greenl. Ev., §41; 1 Wig. Ev., §437. Thus, the trial judge may assume that the original corporators and stockholders of the corporation respondent are the same now as when the corporation was organized, and such presumption will continue until the contrary is shown, or a different presumption is raised. 10 Cyc. 249, 517; *McHose v. Wheeler*, 45 Pa. 32, 40; *Turnbull v. Payson*, 5 Otto (95 U. S.) 418, 421; 26 Am. & Eng. Ency. Law (2d ed) 1034. This presumption, of course, may be met by proof of the matters required to be kept in the book provided for in section 2548, R. L., above referred to, or by other competent evidence.

The decree therefore is reversed and the cause remanded to the circuit judge with instructions to receive any competent and material evidence the respondents may offer in defense or that the complainant may offer in support of his claim or in rebuttal and for such further proceedings as may be proper.

Thompson, Wilder, Watson & Lymer for complainant.

E. C. Peters for K. Narita and four other respondents.

No. 695. ALLEN & ROBINSON, LIMITED, AN HAWAIIAN CORPORATION, v. CHARLES S. DESKY. Exceptions from Circuit Court, First Circuit. Argued March 31, 1913. Decided April 3, 1913. Robertson, C.J., Perry and De Bolt, JJ. Per Curiam: This is an action of assumpsit upon a promissory note executed by the defendant in the usual form and delivered to the plaintiff on the 9th day of August 1906, and payable three years after date. The circuit court, jury

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waived, rendered its decision in favor of the plaintiff and judgment was entered in accordance with the decision. The defendant excepted to the ruling of the court denying his motion for judgment, and to the decision and judgment for the plaintiff as being contrary to the law and the evidence. The contention of the defendant was and is that the testimony showed that there was no consideration for the note and that there was no liability on the part of the defendant upon the note. The trial court found that the execution of the note had been duly proved and that a valuable consideration for it had been shown.

There was testimony tending to show that some time prior to the date of the note certain coal and ties had been purchased from the plaintiff by or on behalf of the defendant; that the goods were charged by the plaintiff to the account of the defendant and bills therefor had been rendered to the defendant; that the goods were delivered at the power house of the Pacific Heights Electric Railway Company, Limited, a corporation of which the defendant was president and manager, and had been used solely by the company; that the plaintiff did not know the Pacific Heights Railway Company in the matter; that the manager of the plaintiff corporation, who obtained the note from the defendant, was not aware of the existence of such a company, and supposed that the railway was owned or controlled by the defendant himself; that the note had been given in settlement of the account; and that the defendant, on being requested to pay the bill, said that he had no money but was willing to give a note for the amount and that if he should ever be able to pay the note he would do so.

Counsel for the defendant argues that the debt was that of the Pacific Heights Electric Railway Company and that as there was no agreement on the part of the plaintiff to release that company from its indebtedness, and that as no consideration of any kind moved to the defendant, he was not liable upon the note.

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The defendant, so far as appears, made no objection to the goods being charged to his account or to the bills being rendered to him personally. On being requested to pay the account the defendant did not deny liability, but expressed a willingness to give the note in settlement of the account as above stated. There was ample basis in the evidence for the view that the note was given in payment of an open account which the plaintiff had against the defendant personally. The finding of the trial court that a valuable consideration for the note was proven, being supported by the evidence, is not to be disturbed.

The exceptions are overruled.

I. M. Stainback (Holmes, Stanley & Olson on the brief) for plaintiff.

F. W. Milverton for defendant.

GOO YEE v. HARRY ROSENBERG.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED MARCH 17, 1913.

DECIDED APRIL 11, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

CONTRACTS—effect of illegality—parties in *pari delicto*.

Contracts founded upon an illegal consideration or which contemplate the performance of that which is either *malum in se* or prohibited by some positive statute are void and one who has paid money in pursuance of such a contract will, after the contract has been performed and when the parties are in *pari delicto* ordinarily be denied the aid of the courts in recovering the money so paid.

Id.—parties not in *pari delicto*.

Though both parties to the transaction are *particeps criminis* still if they are not in *pari delicto* the one less guilty will ordinarily not be denied the assistance of the courts.

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Id.—*malum prohibitum*—where penalty on one party only.

Where the law has prohibited the act of one only of the parties to a transaction, the one whose act is not prohibited is, when the offense is merely *malum prohibitum*, not in *pari delicto*.

Id.—*unlawful intention on one side only, together with fraudulent representations.*

One who, desiring to act lawfully, is induced to purchase contraband opium by the fraudulent representation of the seller, believed and relied upon, that the opium was lawfully imported prior to the enactment of the federal act of February 9, 1909, is not in *pari delicto* with the seller and will not be denied relief by the courts.

ASSUMPSIT—*money had and received—money obtained by fraud.*

An action for money had and received will lie to recover money obtained by the defendant from the plaintiff by deceit. The law implies a promise by the defendant to repay it to the plaintiff.

Id.—*defense that money was paid to another.*

One who has induced another to purchase opium by the fraudulent representation that the opium was lawfully imported and is a lawful subject of commerce and has by means of the representations obtained money from the purchaser, cannot set up in defense to a suit for the money so obtained by fraud that he acted as agent for the United States and has paid over the money to his principal.

OPINION OF THE COURT BY PERRY, J.

(Robertson, C.J., Dissenting.)

This is an action of assumpsit for money had and received, the amount claimed being \$114. The jury rendered a verdict for the plaintiff. The defendant's exceptions now relied upon are to the denial of a motion for a directed verdict made at the close of plaintiff's opening statement and again at the close of plaintiff's evidence, to certain instructions given to the jury, to the verdict as contrary to the law and the evidence and to the overruling of a motion for a new trial.

Evidence was adduced tending to show the following facts: that plaintiff was engaged in the business of buying and peddling merchandise and was in the habit of buying some, at least,

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of his goods from defendant; that in 1909 and 1910 in consequence of a prescription by a Chinese doctor plaintiff used opium for an ailment from which he was suffering; that in 1909 defendant, upon learning from plaintiff the fact of his illness and of the prescription, told plaintiff that he (defendant) had opium for sale (this is denied by defendant); that in 1910 plaintiff applied to defendant for opium and that defendant, after consulting his own attorney, informed the United States district attorney of the application, was requested by the latter to make a sale of opium to plaintiff and was furnished by the district attorney, for the purposes of the sale, with three tins of contraband opium which had been confiscated by the United States; that the defendant sold and delivered the opium to plaintiff for the sum of \$114 and that plaintiff paid that sum to defendant; that to none of the three tins of opium were affixed stamps as required by the customs regulations relative to foreign importations but that upon each of the three tins were written the initials, "E. R. S.," of the collector of customs for the port of Honolulu; that plaintiff stated to defendant, before making the purchase, that he wanted stamped opium and that when, in the course of the negotiations resulting in the sale and purchase, defendant exhibited the three tins to plaintiff, the latter objected that the tins were unstamped and defendant, referring to the initials, replied that there was "some writing on it, mark on it that is better than the opium with stamp on it; it is marked from the custom house" (the making of these representations is denied by defendant); that under the direction of the district attorney officers followed the plaintiff from the place where the transaction occurred and shortly thereafter seized the opium and arrested the defendant on a charge of purchasing and receiving contraband opium; that plaintiff was subsequently tried before a jury and acquitted; that the purpose of the district attorney in furnishing the opium and in requesting defendant to make a sale to plaintiff was "to secure evidence in a general

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way relative to the importation and handling of opium and, in the particular case, what connection this defendant" (the present plaintiff) "might have with it;" that the \$114 was subsequently paid by the defendant to the district attorney and that the money has not been repaid or the opium returned to the plaintiff.

An Act of Congress approved February 9, 1909 (35 Stat. at Large, p. 614), prohibits the importation of opium in any form save for medicinal purposes only and under regulations which the secretary of the treasury is authorized to prescribe, and renders unlawful the receipt, concealment, purchase and sale of opium imported contrary to law. Under sections 1399 and 1400, R. L., the sale of opium, "except upon the written prescription of a duly licensed physician signed by him" is forbidden and made criminal. It is not contended that the transaction in question was within either of the exceptions named in these statutes.

The presiding judge instructed the jury that "the dealing in unstamped opium in the Territory is prohibited by the general statutes of the United States" and that if this plaintiff "purchased from the defendant opium prohibited by the statutes of the United States, knowing such to be the case, any sum which he may have paid for such opium, actually received by the defendant, could not be recovered back by the plaintiff in an action of this kind"; that "the sale of opium in any form, stamped or unstamped, is also prohibited by the statutes of the Territory, excepting by a person duly licensed for such purpose"; and also that "if you find that this plaintiff paid his money to the defendant knowingly, openly and in violation of the statute of the Territory, then a recovery could not be had by the plaintiff against the defendant, but if you find as the law says that those parties were not *in pari delicto*, in other words, equally responsible for this transaction, and that the plaintiff was induced, either by deceit, undue influence or by fraud, to enter into this

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transaction, then in my opinion the amount paid for the opium or other substance could be recovered by the plaintiff as against the defendant in an action of this kind."

The general principles suggested by a consideration of this case are well known, but the applicability of those principles presents questions not free from difficulty. It has been long settled, for example, that contracts founded upon an illegal consideration, or which contemplate the performance of that which is either *malum in se*, or prohibited by some positive statute, are void and that one who has paid money in pursuance of such a contract will, after the contract has been executed, and when both parties are in *pari delicto*, or equally guilty, be denied the aid of the courts in recovering the money so paid. *Spring Co. v. Knowlton*, 103 U. S. 49; *Tracy v. Talmage*, 14 N. Y. 162; 2 Parsons on Contracts 746. It is as well settled, however, that though both parties to the transaction are *participes criminis*, still if they are not in *pari delicto*, the one less guilty will not be denied the ordinary assistance of the courts. *White v. Franklin Bank*, 22 Pick. 181; *Lowell v. Boston and Lowell R. R.*, 23 Pick. 24; 1 Story, Eq. Jur., §300; Bishop on Contracts, §629. And where the law has prohibited the act of one only of the parties to a transaction and has thus "marked the criminal," the legislation being with full knowledge that the other party is indispensable to the transaction, the one whose act is not prohibited is, when the offense is merely *malum prohibitum*, not equally guilty, even though his part was necessarily an incitement to the performance of the prohibited act. *Tracy v. Talmage*, supra; *Thomas v. Richmond*, 12 Wall. 349; *White v. Franklin Bank*, supra; *Duval v. Wellman*, 124 N. Y. 156; *Manchester R. R. v. Concord R. R.*, 9 L. R. A. (N. H.) 689; *Williams v. Hedley*, 8 East 378. It has likewise been held that "even where the contracting parties are in *pari delicto*, the courts may interfere from motives of public policy. Whenever public policy is considered as advanced by allowing either party to sue

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for relief against the transaction, then relief is given to him." *Hobbs v. Boatright*, 5 L. R. A., N. S., 906 (Mo. 1906); 2 Pom. Eq. Jur., §941.

Viewing the case at bar with reference to the territorial statute alone, which renders unlawful the sale, but not the purchase or the possession, of opium, whether it was imported lawfully or unlawfully, it is clear that the plaintiff was not in *pari delicto* with the defendant and should not be denied an investigation by the courts into the merits of his claim. On the other hand, the federal statute of February, 1909, attached criminal penalties to the purchasing and receiving as well as to the selling of opium and if there were no more to the case the conclusion would be required, *in limine*, that the plaintiff was a *particeps criminis* and in *pari delicto* in a violation of a positive statute and could not be heard in a judicial tribunal. But the federal statute in question does not relate to opium lawfully imported prior to its enactment. It is at this point that the contention on behalf of plaintiff becomes material, that the defendant inveigled him into making the purchase by the false representation that the three tins of opium offered for sale had been lawfully imported and that the customs collector's initials written on each of the tins showed this as clearly as would have been indicated by government stamps. Passing for the moment the question whether the misrepresentation was one of fact or one of law and, if of law only, whether plaintiff was conclusively chargeable with a knowledge of the law, plaintiff is not, for the purposes of this civil action, to be regarded as having been equally guilty if in truth by reason of false representations by defendant, believed and relied upon by the plaintiff, the latter was induced to make the purchase in good faith, in the belief that that particular opium had been lawfully imported and that he could lawfully buy it. "Where a man is defrauded, as often happens, by the misrepresentations of someone who assumes knowledge, and where, under the circum-

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stances, he is actually deceived, and not consciously wrong, the fact that the transaction is against public policy in law will not necessarily compel the victim to submit to the fraud of the actual villain. The only rigid rule forbidding relief is where the parties are in equal guilt. While the law does not draw fine distinctions in ascertaining equality of wrong, it recognizes the fact that one party to such an arrangement is not necessarily an equal party in guilt, or consciously guilty at all, and will not deny relief to an injured party against the one who is really the deceiver, and who commits fraud by means of his persuasive or other influence." *Hess v. Culver*, 6 L. R. A. 500. See also *Knight v. Linzey*, 8 L. R. A. 476. It would be abhorrent to one's sense of justice to close the door of the courts to one who consciously committed no offense and who was induced to join in the transaction and part with his money by the fraudulent representations (of the nature mentioned) of the defendant who asks that the plaintiff be not heard.

It is urged, however, that plaintiff was chargeable with knowledge of the law and that no misrepresentation concerning the law can now be of avail to him. Let it be assumed that the misrepresentation was purely on a matter of law. The maxim is certainly familiar that *ignorantia legis neminem excusat*; and yet one court (*Haven v. Foster*, 9 Pick. 111, 129) has said that "whether money paid through ignorance of the law can be recovered back, is a question much vexed and involved in no inconsiderable perplexity" and another (*Swedesboro Association v. Gans*, 65 N. J. Eq. 132, 133) that "this maxim is subject to so many exceptions that it is quite as often inapplicable as applicable to supposed mistakes of law." See also *Freichnecht v. Meyer*, 39 N. J. Eq. 551, 558. The following observations on the subject are eminently just and sound: "That a party may not urge his ignorance of the law as an excuse or palliation of a crime, or even as a fault, we may admit; that he may not, by reason of such ignorance, or mistake,

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obtain any right or advantage over another, we may admit; but we do not admit, that such other may obtain or secure an unjust advantage over him, by reason of his ignorance or mistake, even of the law. We agree that men should not complain of the consequence of their deliberate and voluntary acts; but we do not agree, that acts performed under the influence of essential and controlling mistakes, are voluntary, within the meaning of the maxim referred to. And we say, that neither maxims of law, nor fictions of law, should be so applied as to work manifest injustice." *Northrop v. Graves*, 19 Conn. 547, 559, 560. Kerr (Fraud & Mistake, pp. 398, 400), referring to the jurisdiction in equity and to mistakes of law, says: "If it appear that the mistake was induced or encouraged by the misrepresentations of the other party to the transaction, or was perceived by him and taken advantage of, the court will be more disposed to grant relief than in cases where it does not appear that he was aware of the mistake;" and "where a contract is executed under a mistake, in point of law, where mistake is produced by the representation of one of the parties, the other may be relieved, as well as if the mistake was as to matter of fact." "If a party, who himself knows the law, should deceive another, by misrepresenting the law to him * * * relief would be granted on the ground of fraud." *Jordan v. Stevens*, 51 Me. 78, 81. See also *Brock v. Weiss*, 44 N. J. L. 241, 244, and 2 Pom. Eq. Jur., §847. If, therefore, the plaintiff's mistake, if there was one, as to the law was induced by the fraudulent representation of the defendant, the maxim under consideration would not apply to defeat his right to a hearing in court or to a recovery. The ordinary rule is that courts will lend their aid to the determination of controversies arising between individuals. An exception is that such aid will not be granted where the transaction out of which the controversy arose is illegal and both parties are in *pari delicto*; but where the plaintiff's participation in the transaction is induced by the defendant's fraudulent representa-

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tion that the article dealt in has been lawfully imported and is a lawful subject of trade, the exception does not apply. Such a plaintiff is in this respect in as favorable a position as any other person innocent of wrong doing.

If the instructions given to the jury were not sufficiently precise or were otherwise objectionable, the error will doubtless be cured at a new trial.

As to the truth or falsity of plaintiff's claims concerning false representations by the defendant, that is a matter wholly within the province of the jury to determine. If there were no false representations by defendant to the effect that the opium had been lawfully imported or if the representations, if made, were not believed or relied upon by the plaintiff, the latter was in view of the federal statute in *pari delicto* with the defendant and the courts will leave the parties where they find them and accordingly render judgment for the defendant.

The point is also made that since the \$114 has been paid by defendant to the United States district attorney and by the latter to the treasurer of the United States, plaintiff cannot recover. The sale occurred on November 29, 1910. Plaintiff was on February 9, 1911, tried and acquitted on the criminal charge of purchasing and receiving the opium. After the trial defendant paid the money to the district attorney. Defendant's own evidence, relating to the money, was that during the intervening time he "used—had it in the bank." Without relying, however, upon the testimony last quoted, defendant should not be permitted to defeat a recovery by merely showing that he paid the money to another. Immediately upon obtaining the money by fraud, if he did, the law implied a promise on his part to repay it; and an action of assumpsit, for money had and received, will lie. 27 Cyc. 863; *Humbird v. Davis*, 210 Pa. St. 311; *Minor v. Baldridge*, 123 Cal. 187; *Young v. Taylor*, 36 Mich. 25. The rule that an action for money had and received will not lie against an agent who has paid the money to his principal before receipt of notice that it is claimed by the

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person from whom he received it does not apply. While the defendant had been constituted the agent of the United States for the purpose of detecting an offender, he was acting outside of his employment when (if he was guilty of so doing) he induced the plaintiff to purchase opium by the false representation that it was lawfully imported opium. The relation of principal and agent did not exist for any such purpose. *Bocchino v. Cook*, 67 N. J. L. 467; *Bennett v. Ives*, 30 Conn. 329; Story, Agency, §320. It cannot be presumed that the United States was a party to such a fraud and upon the evidence there is no room for the inference that the district attorney directly or indirectly authorized, encouraged or countenanced it. The United States, if aware of the fraud, would have repudiated the sale and declined to accept the money as not belonging to it or in any way forfeitable to it by either of the parties. The opium was contraband and of no monetary value and if the sale was procured through this fraud and therefore without participation by the United States defendant was under no obligation to pay the money to the United States and must be regarded as having received it for his own benefit and as having converted it to his own use. *Bocchino v. Cook*, supra. The fact that the money was not in defendant's possession at the time of suit or that he himself derived no benefit from it is not of itself conclusive against the maintenance of the action. Even in a case of agency, "if the money is obtained by the agent illegally, by compulsion or extortion, it seems that an action will lie against the agent, though it has been paid over to his principal without notice, unless the payment was made expressly for the use of the principal." *Butler v. Livermore*, 52 Barb. 570, 579. See also *Ripley v. Gelston*, 9 Johns. 201, 207, 208; *Frye v. Lockwood*, 4 Cowen 454, 456, and *Mechem on Agency*, §564.

The plaintiff did not testify, and there was not sufficient evidence to sustain a finding, that he believed and relied upon the defendant's alleged false representations. For this reason the verdict cannot be upheld and the exceptions must be sustained.

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But judgment *non obstante veredicto* should not be directed. There was no motion for such a judgment, merely a motion for a new trial. Without saying that such a motion is indispensable, judgment *non obstante* should not be granted unless it appears that on a new trial the plaintiff will not be able to supply the defects in the evidence and make a showing which would sustain a verdict in his favor. 23 Cyc. 779, 778. Without violating the rule that questions of credibility are for the jury alone, we cannot undertake to say that such a showing cannot be made by plaintiff.

The exceptions are sustained, the verdict set aside and a new trial granted.

J. Lightfoot for plaintiff.

C. C. Bitting for defendant.

DISSENTING OPINION OF ROBERTSON, C.J.

I think there is nothing to be gained by a re-trial of this case. The essential facts of the case are uncontradicted and either the plaintiff or the defendant should have judgment according to what the law is as applied to those facts. The story is a simple one. The defendant informed the United States district attorney that a Chinaman had expressed a desire to buy some opium. The district attorney furnished the defendant three tins of contraband opium to sell to the plaintiff in order that he might be caught and arrested upon a charge of violating the federal statute which prohibits (except for medicinal purposes under certain regulations) the importation of and traffic in opium. The plaintiff was proceeding in violation of the statute. The transaction has been referred to as a sale but it is perfectly plain that it was only a trap, and that there was no intention that any right of property in the opium or any beneficial use thereof was to be given to the plaintiff. He was to be immediately arrested and the opium taken from him. The scheme contemplated that money was to be accepted from the

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plaintiff but it was arranged that he should get nothing for it. The plan succeeded and the object was accomplished. The plaintiff was defrauded out of \$114. If the plaintiff is entitled to maintain this action because of a fraud perpetrated on him by the defendant, irrespective of the defendant's purpose, the judgment should be affirmed at once for the evidence is uncontradicted that the plaintiff was defrauded of his money. Surely, there is no need of another trial to enable the plaintiff, if possible, to aggravate the fraud.

An action in affirmance of an illegal transaction or contract cannot be maintained but one in disaffirmance of it may be. The maxim *In pari delicto* will not be applied so as to prevent a recovery where the plaintiff is shown to have been the victim of the positive fraud or imposition of the defendant and the transaction in which they were engaged was not *malum in se*. In such cases relief is sometimes granted even though the plaintiff shows himself to be substantially in equal fault as to the main transaction. There is abundant authority for the proposition that when one has by fraud induced another to pay him money he may not refuse to return it on the ground that both parties had an illegal end in view in the transaction, and that the plaintiff was *in pari delicto*. The defendant in such a case will not be allowed to profit by his own fraud. *Catts v. Phalen*, 2 How. 376; *National Bank & Loan Co. v. Petrie*, 189 U. S. 423; *In re E. J. Arnold & Co.*, 133 Fed. 789; *Stewart v. Wright*, 147 Fed. 321; *Hinsdill v. White*, 34 Vt. 558. In the case at bar the action is in disaffirmance of the illegal transaction and proceeds upon the theory that the law has raised an implied promise on the part of the defendant to repay to the plaintiff the sum paid for the opium. But will the law, under the facts of this case, imply such a promise? I think not. Assuming, without conceding, that the plaintiff has a cause of action against the defendant, and assuming that in certain cases a plaintiff may waive a tort and sue in assumpsit upon one or more of the common counts notwithstanding that our statute

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(R. L. Sec. 1712) contemplates that in actions upon unliquidated demands the plaintiff's complaint shall "set forth the cause and manner in which the injury was done circumstantially with a view to proof," the question is whether in a case like this the plaintiff may waive the tort and maintain an action of assumpsit for money had and received. Here, the defendant did not convert the plaintiff's money to his own use. He neither sought nor made any profit or gain out of the transaction. Neither did the district attorney. The money which came into their hands as an incident to the scheme to entrap the plaintiff passed as through a conduit to the United States treasury.

To maintain assumpsit for money had and received it is necessary to establish that the defendant has received money belonging to the plaintiff which in equity and good conscience he should return. It is not sufficient to show that the defendant has by fraud or other wrong caused the plaintiff loss or damage. "A party may in some cases waive a tort, that is, he may forbear to sue in tort, and sue in contract, where the matter out of which his claim arises has in it the elements both of contract and tort. But it has been well said that 'a right of action in contract cannot be created by waiving a tort, and the duty to pay damages for a tort does not imply a promise to pay them, upon which assumpsit can be maintained. *Cooper v. Cooper*, 147 Mass. 370, 373.'" *Bigby v. United States*, 188 U. S. 400, 409. In order to maintain an action of assumpsit where damage has been caused by a trespass the implied contract must be predicated on the "duty to disgorge the proceeds of an unlawful acquisition, and not upon the mere general duty to compensate for injury done," and "it is essential that there should be an unjust enrichment of the estate of the tortfeasor." 3 Street, *Foundations of Legal Liability*, 197, 200. *Tillman v. Spencer*, 2 Haw. 178, 182; *Downs v. Finnegan*, 58 Minn. 112. The rule is a general one and includes cases in which fraud or other wrong forms the gravamen of the plaintiff's case. "Assuming a defendant to be a tortfeasor, in order that the doctrine

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of waiver of tort may apply, the defendant must have unjustly enriched himself thereby. That the plaintiff has been impoverished by the tort is not sufficient. If the plaintiff's claim, then, is in reality to recover damages for an injury done, his sole remedy is to sue in tort." Keener on Quasi-Contracts, 160. *National Trust Co. v. Gleason*, 77 N. Y. 400; *New York Guar. & Ind. Co. v. Gleason*, 78 N. Y. 503; *Patterson v. Prior*, 18 Ind. 440.

In the case at bar the plaintiff repudiates, as he must, the illegal transaction in which he engaged with the defendant, and seeks reparation for the tort by which he was damaged to the extent of \$114. Without saying that the plaintiff has another remedy, it is clear that as the defendant or his principal, the district attorney, made no gain out of the affair, the law has raised no implied promise on the part of the defendant upon which *indebitatus assumpsit* can be predicated.

If the view I take of the case is the correct one the defendant's motion that the jury be instructed to find a verdict for the defendant should have been granted, and the case should now be remanded with instructions to enter judgment for the defendant.

IN THE MATTER OF THE APPLICATION OF OTTO
GERTZ FOR A WRIT OF HABEAS CORPUS.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED APRIL 14, 1913.

DECIDED APRIL 16, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

EXTRADITION—purpose of—prisoner on parole.

Where a prisoner in California, who has been released on parole on certain conditions including the conditions that he would not leave the county in which he had been convicted without the permission of the probation officer of that county, and that he would

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report to such officer twice each month as to his conduct and deportment, leaves that State and comes to this Territory in violation of the terms of his parole, and his extradition and return to California for the purpose of serving his sentence is sought, the offense for the commission of which he was convicted, and not the breaking of parole, must be regarded as the ground upon which the requisition for his apprehension and delivery is based.

SAME—escaped prisoner—violation of parole—fugitive from justice.

A prisoner is charged with crime as well after he has been convicted and sentenced, the sentence remaining unsatisfied, as before trial, and he may be extradited as a fugitive from justice in this Territory where it is shown that he left the State wherein he was convicted in violation of the conditions upon which he had been released from jail upon parole, one of those conditions being that he should not leave the county in which he had been convicted and sentenced. An escape from the limits prescribed in a parole is, in effect, an escape from the jail.

OPINION OF THE COURT BY ROBERTSON, C.J.

This is an appeal from a judgment of a circuit judge of the first circuit made in a proceeding in *habeas corpus* discharging the petitioner, Otto Gertz, from the custody of David Ahern, sheriff of Sacramento county, California, by whom the petitioner was held under a warrant issued by the governor of this Territory upon the requisition of the governor of the State of California, under date of March 27, 1913, commanding the arrest of said Otto Gertz and that he be delivered into the custody of said David Ahern to be taken back to the State of California.

Counsel for the petitioner contend that the warrant of the governor of Hawaii is void because, as they claim, there was no sufficient basis for the issuance of the requisition by the governor of California. Their principal contention is based on the assumption that the authorities of California seek to extradite the petitioner because as a prisoner on parole in that State he broke parole, and from this they argue that as breaking parole is not a crime under the laws of California and as

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the only showing made before the governor of California, upon the application for the issuance of a requisition that Otto Gertz had broken parole was the affidavit of one Eva G. Gertz, sworn to before a notary public, who deposed upon information and belief that the said Otto Gertz departed from the county of Sacramento, State of California, for the purpose of avoiding arrest, that he is a fugitive from justice, and is now in the Territory of Hawaii, the requisition should not be honored. This, counsel claim was not a compliance with the provision of section 5278 of the Revised Statutes of the United States which requires the production of "a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor," etc. We think the assumption that the petitioner is sought to be extradited for breaking parole is not warranted by the facts. The breaking of his parole may be regarded as the immediate cause of the petitioner's extradition, but it is not the offense for which the State of California desires to punish him. The affidavit referred to, of Eva G. Gertz, concludes with the prayer that "a requisition issue for the said Otto Gertz and that he be brought back to the county of Sacramento, State of California, for the purpose of serving his sentence under commitment." What was meant is disclosed by the application made to the governor of California for the requisition by the district attorney of the county of Sacramento which was based not only on the affidavit of Eva G. Gertz but upon the record of certain criminal proceedings had in the superior court of that county in which said Otto Gertz was the defendant, as follows: The sworn complaint of Eva G. Gertz made before the judge of said court, sitting as a committing magistrate, in which the defendant was charged with wilfully omitting without lawful excuse to furnish necessaries for his minor child, Lawrence Ward Gertz, in violation of section 270, of the penal code of

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California; the order of the committing magistrate holding the accused to answer said charge and fixing his bail; an information made by said district attorney and filed in said superior court, on June 8, 1911, charging the commission of said offense, to which, upon arraignment, the accused entered a plea of guilty; the staying of proceedings until the further order of the court, agreeably to the provisions of section 1203 of the penal code of California, and the discharge of the accused on the same day upon the conditions of a certain probation order which was made and entered in open court; the subsequent appearance of said Otto Gertz before the court, the finding by the court that he had violated the terms of the probation order, the setting aside of that order, and the judgment of the court, on September 30, 1912, that the accused be punished by imprisonment in the county jail of Sacramento county for the term of two years; and the application of the prisoner to the board of parole commissioners for that county, on December 31, 1912, to be paroled upon certain conditions set forth in the application including the conditions that the applicant would not leave the county of Sacramento without the permission first had and obtained of the probation officer of said county and that he would report to said officer in person on the first and third Mondays in each month as to his conduct and deportment. The district attorney, in his application for the requisition, stated, among other things, that "the fugitive is charged and has been convicted of a felony under section 270 of the Penal Code of this state," that "I have, as I believe, sufficient evidence to show that the fugitive has broken his parole," and that "in my opinion the ends of public justice require that the alleged criminal be brought to this state for service of sentence at the public expense." From all this it appears that the extradition of the prisoner is not sought for the purpose of prosecuting him upon a charge of breaking parole, but in order that he may be compelled to serve the sentence heretofore imposed upon him for

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the offense to the commission of which he pleaded guilty in the superior court of Sacramento county. As the record shows that that offense was charged both by the complaint of Eva G. Gertz which was sworn to before the judge of the superior court, and by the information presented to the superior court by the district attorney the provision of section 5278 of the Revised Statutes, which has been invoked by the petitioner, must be regarded as having been complied with.

It is contended that as the affidavit of Eva G. Gertz does not set out that Gertz was not granted permission to leave Sacramento county it is to be presumed in favor of the prisoner that such permission was given. If such permission was in fact given it would be a matter peculiarly within the knowledge of the petitioner and it would be an easy matter for him to show it. He has made no claim that he obtained permission from the probation officer to leave Sacramento county. In the application for the requisition the district attorney represented that the petitioner "fled from the State breaking his parole." There is no merit in this point.

The only remaining points made on behalf of the petitioner which require notice are the contentions of counsel that the original complaint against the petitioner has become merged in the judgment of sentence of two years' imprisonment, so that there is not now pending and undisposed of in California any charge by indictment, information, affidavit or otherwise against the petitioner; and that, the petitioner, having been released from custody on parole, is not to be considered a fugitive from justice because he left the county of Sacramento and came to this Territory in violation of the terms of his parole. The law is against the petitioner on both points. In the case of *Drinkall v. Spiegel*, 68 Conn. 441, the court dealt with arguments similar to those which have been advanced in the case at bar. As to the point that there was no charge pending against the petitioner, the court there said, "A person can be said to be charged with crime as well after conviction as before. The conviction

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simply establishes the charge conclusively. An unsatisfied judgment of conviction still constitutes a 'charge' within the true intent and meaning of the Constitution. An indictment or affidavit merely presents the charge, while a conviction proves it. To warrant extradition, the statute requires an indictment or affidavit charging a crime; but if, in addition thereto, there is also presented a record of conviction, the case is not weakened, but rather strengthened." See also *Hughes v. Pflanz*, 138 Fed. 980. As to the point as to the petitioner's having been released upon parole, the court in the Connecticut case said, "The plaintiff was permitted to go outside the reformatory upon his acceptance of and promise to obey the directions contained in the parole, while, so far as appears, he did not go to Michigan at all, but came to Connecticut, and has never obeyed the directions and rules to which he had agreed. If he had gone to Michigan, and it had been sought to secure his return from that State by a requisition upon the Executive, a question might have been presented which we have no occasion to consider. He was in this State, not because of the parole, but in violation of the parole. He has used the parole as a means by which to practice a fraud on the managers of the reformatory, thereby to escape from his imprisonment. If the plaintiff had escaped from the reformatory by force, he should unquestionably be returned; but a prisoner who eludes the vigilance of his keepers by fraud is in no better plight than one who does so by force. * * * * When the plaintiff was liberated from confinement within the reformatory, and found himself at large in the State of New York, he was, in effect, within the prison liberties. But it is the settled doctrine on this subject that the liberties of the prison is an extension or enlargement of the walls of the prison. A person therefore is in prison, in legal contemplation, when within the liberties of the prison. An escape from the liberties is an escape from prison." 68 Conn. 449, 450. We agree with the reasoning of the court in that case.

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The requisition of the governor of California was in due and proper form. It demanded the arrest of Otto Gertz and that he be delivered to David Ahern, the respondent, who is authorized to receive, convey and transport the petitioner to the State of California. The respondent holds the petitioner under legal process and by proper authority.

The judgment appealed from is vacated and set aside; the writ is dismissed, and the petitioner is remanded into the custody of the respondent.

R. P. Quarles (*Andrews & Quarles* on the brief) for petitioner.

L. P. Scott, Deputy Attorney General (*Wade Warren Thayer, Attorney General*, with him on the brief), for respondent.

FRANK G. CORREA v. DAVID K. KAPIIOHO, KEAWE,
PIIALII AND KALA.

APPEAL FROM DISTRICT MAGISTRATE OF MAKAWAO.

SUBMITTED APRIL 21, 1913.

DECIDED APRIL 29, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

ANIMALS—*sufficiency of application for impounding.*

An application for impounding twenty-seven head of cattle, wherein each animal is properly described on a printed blank, in a column intended for "a statement setting forth the number and species of estrays," which application is signed by the applicant at the bottom of the column reserved for that purpose and opposite the description of the animal last described on that page, is sufficient and a compliance with section 5 of Act 125, Laws of 1907.

EVIDENCE—*judicial notice.*

A court takes judicial notice of the territorial extent of its own jurisdiction and of the general geographical features and sub-

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divisions of the district over which its jurisdiction extends. The district court of Makawao, county of Maui, takes judicial notice of the fact that Omaoplo is in the district of Makawao.

In.—burden of proof.

Under section 21 of Act 125, Laws of 1907, relating to the procedure in a suit instituted to determine the validity of impounding animals, the burden is upon the party who impounds the animals to show that he has the right to impound them.

OPINION OF THE COURT BY DE BOLT, J.

This is an appeal by the plaintiff, Frank G. Correa, on points of law from a judgment of the district magistrate of Makawao, county of Maui.

The record shows that David K. Kapiioho, one of the defendants, on February 17, 1913, had twenty-seven head of the plaintiff's cattle impounded in the Makawao pound. The plaintiff on the next day, February 18, proceeding, apparently, under the provisions of Act 125, Laws of 1907, and upon the theory that the impounding of the cattle was illegal, deposited with the district magistrate the sum of \$36.90 to cover pound fees, damages and expenses claimed by the defendants as incident to the impounding, as well as costs of court, and having filed with the district magistrate his complaint against the defendants, alleging that the cattle were illegally impounded and praying for damages in the sum of \$250, the cattle were thereupon returned to him by the pound master.

Summons was issued and served upon the defendants and trial was had, and from the judgment rendered this appeal was taken.

The witnesses sworn on behalf of the plaintiff were the pound master and the plaintiff himself. There was no evidence adduced by or on behalf of the defendants.

The pound master testified, in substance, that he kept a record of all proceedings relating to the pound, which record was introduced in evidence; that on February 17, 1913, between the hours of six and seven o'clock in the evening, David

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K. Kapiioho impounded twenty-seven head of cattle belonging to the plaintiff; that he put one notice outside of the pound, and that was the only notice put up.

The plaintiff testified, in substance, that he resided at Omaopio, Kula; that he was a farmer and rancher; that on February 17, 1913, some of his cattle were taken from him; that Kapiioho notified him that he, Kapiioho, had taken up twenty-seven head of his cattle for trespassing and made demand upon him for sixty cents a head; that the defendants took the cattle to the Makawao pound where they were kept until the next morning; that the cattle were poor and weak; that they traveled twelve miles in going to and in returning from Makawao; that one died; that five were left by the road side; and that he had sustained damages in the sum of \$250.

The magistrate found that the impounding was legal and rendered judgment in favor of the defendants, and ordered the plaintiff to pay all trespass fees, pound fees, driving expenses, and costs of court,—a total of \$35.90.

The points of law upon which the appeal is prosecuted are as follows: (1) That in the application for impounding the cattle, David K. Kapiioho, the person wishing to have them impounded, did not sign his name to a statement setting forth the number and species of estrays; (2) that the locality trespassed upon by the cattle was not named as required by law; (3) that written or printed notices were not posted by the pound master as required by section 8 of Act 125, Laws of 1907; (4) that there is no evidence showing or tending to show that the cattle trespassed upon the land of the defendants; (5) that there is no evidence showing or tending to show that the cattle were estrays under the law; (6) that there is no evidence showing or tending to show that the defendants were authorized to take up estrays on government land.

The points of law above mentioned will be considered in the order named.

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1. Application for impounding. The pound master's record kept pursuant to section 5 of the statute, consists of printed blanks bound in book form, each page being divided into columns of proper width by perpendicular lines with an appropriate heading to each column according to the statement to be entered therein. In the column intended for "a statement setting forth the number and species of estrays" is a proper description of each animal impounded. David K. Kapihoho, who impounded the cattle, instead of signing his name opposite the description of each animal,—thus signing his name twenty-seven times as the plaintiff contends he should have done—only signed once, i. e., at the bottom of the column reserved for the signature of the person impounding estrays and opposite the description of the animal last described on that page. This was sufficient. The purpose and intent of the person thus signing is clear. He obviously intended to and did sign "a statement setting forth the number and species of estrays." The statutory requirement in this respect was, therefore, complied with.

2. As to the locality. The locality named in the statement where the trespass is claimed to have occurred is Omaopio. The plaintiff contends that this was not sufficient, but that the pound master's record should have shown affirmatively that Omaopio was in the district of Makawao. The district magistrate held, however, that the court took judicial notice of the fact that Omaopio was in the district of Makawao. This, we think, was correct. Moreover, the plaintiff does not contend nor undertake to point out that Omaopio is not in the district of Makawao.

It is a familiar rule that a court takes judicial notice of the territorial extent of its own jurisdiction and of the general geographical features and subdivisions of the district over which its jurisdiction extends. 1 Greenl. Ev. §6; 4 Wig. Ev. §2575 and note 1; 1 Jones Ev. §§107, 127, 128.

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3. As to the posting of notices by the pound master. This requirement can have no possible application to the facts of this case as disclosed by the record before us. The statutory notices required by section 8 of the statute are essential only in contemplation of a sale by the pound master of the animals impounded. A strict compliance with the statute by the pound master in this regard is, of course, indispensable to the validity of a sale by him. *Kila v. Kahuhu*, 8 Haw. 212. In the case at bar, however, there was no sale, or occasion for any sale, as the plaintiff took his cattle away the next morning after they had been impounded. He was in no way injured by any act or failure of duty on the part of the pound master and he has no cause of complaint against him.

4. The fourth point is abandoned.

5. Estrays under the law. Section 7 of the statute reads: "If any horse, mule, ass, hog, sheep, goat or neat cattle shall be found at large, and not upon the land of the owner, or person having charge of such animal; or if found doing damage to the property of private individuals, or of the government, such animal shall be regarded as an estray within the meaning of this Act."

In our opinion the fifth point is well taken. The record does not disclose any evidence tending to show that the cattle in question were "found at large, and not upon the land of the owner, or person having charge of such animals;" or that they were "found doing damage to the property of private individuals, or of the government." It was incumbent on the defendants to show that the cattle were estrays under the law, as defined by section 7 above quoted. This, they failed to do. The plaintiff should not be required to show the negative of this question, namely, that the cattle were not estrays.

6. Estrays on government road and government land. Section 15 of the statute, so far as it is applicable to this case, reads: "If any animal mentioned in section 12" (any cattle,

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horse, mule, ass, swine, sheep or goat) "shall trespass or stray * * * upon any government land, in this Territory, any police, constable or such person or persons as may be thereunto authorized in writing by the Board of Supervisors of the County, are hereby authorized to take up such animal and to impound the same in accordance with the provisions of this Act."

The record fails to show any evidence whatsoever that the plaintiff's cattle did "trespass or stray upon any government road * * * or upon any government land," or that they were trespassing at all, or that the defendants were "authorized to take up such animals and impound the same." It follows, therefore, that the defendants were not entitled to judgment.

7. Counsel for the defendants contend that the burden was on the plaintiff to show that the impounding was illegal. In this connection it may be well to observe that section 21 of the statute contemplates a summary and informal proceeding, in which, we hold, the burden is upon the party who impounds the animals to show that he has the right to impound them.

8. The plaintiff in instituting this proceeding, in addition to contesting the legality of the impounding of his cattle, also sought thereby, as we have already observed, to recover damages as in a common law action. In this respect, he was mistaken. The statute now before us does not contemplate an action of that character.

The judgment is reversed and the cause remanded to the district magistrate for further proceedings therein not inconsistent with this opinion.

D. H. Case and Enos Vincent for plaintiff.

Douthitt & Coke for defendants.

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J. J. BYRNE v. GOO WAN HOY.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED APRIL 30, 1913.

DECIDED MAY 5, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

CONTRACTS—*implied promise to pay—services rendered.*

When a person performs services for another on request or when one performs services for another, who accepts the same, the services not being performed under such circumstances as to show that they were intended to be gratuitous, a promise to pay for the services is implied by law.

OPINION OF THE COURT BY PERRY, J.

This is an action of assumpsit for \$32 for professional services rendered by plaintiff's assignor, a physician and surgeon, to the defendant at the latter's request. The trial court, sitting without a jury, found for the plaintiff and judgment was entered accordingly. The only assignment of error relied upon is that the decision and the judgment are unsupported by evidence.

The plaintiff in error, defendant in the action, obtained from the physician treatment for injuries received in an accident. The main issue of fact in the trial court was whether, in the admitted absence of an express contract, the circumstances under which the services were rendered were such as to create an obligation on defendant's part to pay for them or, in other words, to give rise to the legal implication that he promised to pay. Upon this point both the physician and the defendant gave testimony, the defendant's claim being that the obligation to pay devolved upon an accident insurance company which had issued a policy to him. The evidence was conflicting and the trial court in ordering judgment for the plaintiff declared that it did so "believing and giving more credence to the evidence of the plaintiff than to the evidence of the defendant." The

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physician's testimony was sufficient to support the finding of an implied promise. He testified that the defendant called at his office on thirteen days for treatment and received it, that no discussion was ever had between them as to who would pay for the services, that, while he, the doctor, was employed by the insurance company to make examinations of injured persons and to report to the company the extent of the injuries, it was not a part of his duty as representative of the company to treat the claimant's injuries and that he did not inform the defendant that the company would pay for his treatment. These, it must be presumed, were the facts as found by the court. The ordinary principle applies, that when a person performs services for another on request or when one performs services for another, who accepts the same, the services not being performed under such circumstances as to show that they were intended to be gratuitous, a promise to pay for the services is implied by law.

The judgment is affirmed.

J. Lightfoot for plaintiff in error.

Thompson, Wilder, Watson & Lymer for defendant in error.

LIBERATO GOMEZ v. WILLIAM L. WHITNEY, ALEXANDER LINDSAY, JR., WILLIAM P. JARRETT, E. FAXON BISHOP, AND WILLIAM PFOTENHAUER.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

ARGUED APRIL 21, 1913.

DECIDED MAY 5, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

JUDGES—*civil liability for judicial acts—excess of jurisdiction.*

Judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, provided there is not a clear

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absence of all jurisdiction over the subject-matter. When jurisdiction over the subject-matter is invested by law in the judge or in the court which he holds, the extent and the manner in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his decision in these particulars the validity of his judgment may depend, and for errors in his determination he is not civilly liable.

Id.—*circuit judge—order to secure attendance of witness.*

The circuit court of the first judicial circuit of this Territory and its judges at chambers are courts of superior and general jurisdiction. A judge of that court, sitting at chambers, who in excess of his jurisdiction issues an order requiring a person to enter into a recognizance to appear and testify before a grand jury then engaged in investigating the commission of an offense within the general jurisdiction of the court and commanding that in default thereof the proposed witness be committed to jail, is entitled to the protection of the rule rendering judges immune from civil liability for damages.

ATTORNEY-GENERAL—civil liability for official acts—application for order in excess of court's jurisdiction.

The attorney-general of the Territory is not civilly liable in damages to a person imprisoned under an order made by a circuit judge at chambers in excess of his jurisdiction but in a matter within the general jurisdiction of the court over which he presides and issued upon application of the attorney-general supported by the latter's affidavit and presented in good faith, without the use of improper means and without improper motives.

SHERIFFS AND CONSTABLES—civil liability—protection afforded by process.

The law protects an officer in the execution of process if it is in due form and issued by a court which apparently has jurisdiction of the case, although it may have in fact been issued wrongfully or without authority.

Id.—*service of order compelling attendance of witness.*

A sheriff to whom a judicial order requiring a certain person to enter into a recognizance to appear as a witness and commanding that in default thereof the proposed witness be committed to jail is delivered for service and who, proceeding immediately to the performance of his duty, finds the proposed witness, with the admitted intention of departing from the jurisdic-

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tion, on board of an ocean-going steamship about to cast loose from the dock, does not render himself civilly liable by failing to inform the person named, before taking him ashore, that he may enter into a recognizance, where it further appears that the proposed witness was unable to give bail, that there was no opportunity before the steamship sailed to arrange for and enter into a satisfactory recognizance and that after the arrest the proposed witness remained in custody four days without offering to furnish a recognizance.

FALSE IMPRISONMENT—liability of persons complaining—invalid order for detention of witness.

Persons directly interested in the prosecution of an offender who, either personally or indirectly through their attorneys, request of the attorney-general and the court having general jurisdiction of the subject-matter that an order be issued designed to secure the attendance of a certain witness are not liable in an action for damages resulting in consequence of the order, even though the order prove to have been in excess of the jurisdiction of the court.

OPINION OF THE COURT BY PERRY, J.

In pursuance of an order made by the defendant Whitney, who was a judge of the circuit court of the first judicial circuit, upon the motion and affidavit of defendant Lindsay, who was the attorney general of the Territory, the plaintiff in error was, on March 31, 1911, taken into custody by defendant Jarrett, then sheriff of the City and County of Honolulu, and detained in the county jail until April 4 following when he was released on nominal bail in *habeas corpus* proceedings instituted in his behalf in this court. Subsequently the order of commitment was declared invalid and the plaintiff in error was discharged, the court holding that the circuit judge did not, under the circumstances of the case, have power, either inherent or statutory, to make the order complained of. *In re Craig*, 20 Haw. 447. Thereupon an action was brought by him to recover damages for the arrest and imprisonment, the allegation in the declaration being that Jarrett acted in the matter at the instigation and order and by the procurement of the other defendants, that each

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of the defendants acted with a wanton disregard of the rights of the plaintiff and with malice and without probable cause and that defendant Whitney issued the order not as a judge of the circuit court "or in any other judicial capacity, but, on the contrary, * * * in his capacity as an individual, although, * * * falsely purporting and pretending to act therein in his capacity as a judge." The defendants pleaded the general issue. At the conclusion of the evidence for the plaintiff, the court granted defendants' motion for a non-suit. Hence this writ, the judgment and certain rulings relating to the admissibility of evidence being assigned as error.

The litigation of which this case is a part arose out of attempts said to have been made by one Craig and others in the early part of 1911 to induce, without first having obtained a license so to do, laborers employed in these Islands to go beyond the limits of the Territory. A committee of the Hawaiian Sugar Planters' Association, of which defendants Bishop and Pfotenhauer were members, retained the law firm of Kinney, Ballou, Prosser, Anderson & Marx "to follow the matter", as testified by one of plaintiff's witnesses, "and if they found the law was being violated to take it up with the public prosecutors and punish the people, whoever might be violating the law", "to see that the laws in regard to the recruiting of labor were observed and, if they were not, to prosecute whoever was violating them", "to protect the situation within the laws." Under the direction of the county attorney proceedings were instituted before the grand jury of the circuit court of the first circuit "looking towards an indictment" of Craig and certain men named De Gusman, Alvarado and Balthazar and perhaps one or two others. While these proceedings were pending, the firm of attorneys above mentioned on March 31, 1911, requested of the attorney-general that he make application to the circuit court for an order requiring the plaintiff and certain other laborers named to give recognizance for their appearance as witnesses and committing them to jail until the recognizances

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were furnished, representing that the plaintiff and others were material witnesses in the prosecution of Craig and other alleged emigrant agents and were about to depart for the mainland on the S. S. "Korea" scheduled to sail on that day. The attorney-general after some hesitation and after satisfying himself as to the facts and hearing argument from attorneys representing Craig as well as from the planters' attorneys and after consulting, also, the county attorney, who took the view that the application should be made, executed the combined affidavit and motion already referred to. In that affidavit he deposed, upon information and belief, that "one E. de Guzman and others have for a period of more than one month last past within the City and County of Honolulu and elsewhere within the Territory of Hawaii, been recruiting laborers to work without the limits of the Territory of Hawaii and acting within said Territory of Hawaii as emigrant agents without first having obtained a license so to do, as provided by law"; that the present plaintiff and others named "are persons who have been induced by the said E. de Guzman and others to leave their employment within the Territory of Hawaii and go elsewhere, the same being laborers, and the same being employed to go elsewhere as laborers without the Territory of Hawaii, and that the parties above named are now, as deponent is informed and verily believes, ready to depart from this Territory upon the first steamer that leaves Honolulu en route for California or the western coast of the United States, to-wit, the steamer 'Korea' sailing at 4 p. m. this day"; and that the present plaintiff and others named "are material witnesses to the prosecution of a criminal indictment about to be preferred against the said E. de Guzman and others"; and prayed for "an order that the several witnesses whose names are given above may be required by this court to enter into a recognizance to appear and testify before the Grand Jury of this Court or before this Court upon any indictment rendered by the said Grand Jury against the said E. de Guzman and others, and in default of their furnishing said recognizance

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that the said witnesses be confined within Honolulu Jail pending the hearing before such Grand Jury and before said Circuit Court upon such indictment if the same be returned and filed." Immediately thereafter the application was presented to defendant Whitney, sitting as judge of the circuit court of the first circuit. The judge heard argument, from the attorney-general on the one side and from Craig's attorneys on the other and signed an order requiring the plaintiff and other persons named in the affidavit "to enter into a recognizance to appear and testify before the grand jury of this court in the matter of an indictment about to be preferred against E. de Guzman and others for violation of Act 57 of the Laws of 1905"; commanding that "in default of the furnishing of such recognizance the parties above referred to be arrested and confined in Honolulu Jail until the hearing of said matter before the grand jury and until the hearing of any indictment which may be brought in by said grand jury against the said E. de Guzman and others for violation of the statute hereinbefore referred to" and authorizing and directing the sheriff of the City and County of Honolulu "to carry into force and effect the foregoing order of commitment". Plaintiff and other laborers had been undergoing a five-day period of quarantine on Quarantine Island as required by regulations then in force in the port of Honolulu, preparatory to sailing for the mainland and the federal authorities had refused to permit service of subpoena on the plaintiff and the other laborers while in quarantine. Very shortly before the sailing hour the sheriff served Judge Whitney's order, on board of the steamer, on plaintiff and fourteen others of the seventy-eight named in the order as witnesses, taking them ashore just as the ship was about to leave the dock and thence conveying them to the jail.

All of the foregoing facts are shown by undisputed evidence adduced by the plaintiff. It further appears from that evidence, and no other finding on the subject would have been legally possible, that defendants Lindsay, Whitney and Jarrett

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in respectively procuring, issuing and serving the order acted in good faith, in the performance of their respective duties as they understood them, and without actual malice or from any improper motive.

Upon the question of the liability of a judge of a court of record of superior and general jurisdiction for damages for errors of judgment as to the facts or as to the law, there is practically no conflict in the authorities. Considerations of public policy require that such a judge should not be held liable in damages to a defeated litigant or others affected by his orders for mistakes in his decisions of issues, whether of law or of fact, presented to him in his judicial capacity for determination. The subject is elaborately discussed in *Bradley v. Fisher*, 13 Wall. 335, the court saying, *inter alia*: "It is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful. As observed by a distinguished English judge, it would establish the weakness of judicial authority in a degrading responsibility. The principle, therefore, which exempts judges of courts of superior or general authority from liability in a civil action for acts done by them in the exercise of their judicial functions, obtains in all countries where there is any well-ordered system of jurisprudence. It has been the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country. It has, as Chancellor Kent observes, 'a deep root in the common law.' Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed. The purity of their motives cannot in this way be the subject of

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judicial inquiry." (p. 347) "If * * * a judge could be compelled to answer in a civil action for his judicial acts, not only would his office be degraded and its usefulness destroyed, but he would be subjected for his protection to the necessity of preserving a complete record of all the evidence produced before him, in every litigated case, and of the authorities cited and arguments presented, in order that he might be able to show to the judge before whom he might be summoned by the losing party—and that judge perhaps one of an inferior jurisdiction—that he had decided as he did with judicial integrity; and the second judge would be subjected to a similar burden, as he in his turn might also be held amenable by the losing party." (p. 349) "Judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend." (pp. 351, 352) It was further declared concerning certain erroneous, hypothetical rulings, that "no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him, for these are particulars for his judicial consideration, whenever his general jurisdiction over the subject-matter is invoked. Indeed some of the most difficult and embarrassing

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questions which a judicial officer is called upon to consider and determine relate to his jurisdiction, or that of the court held by him, or the manner in which the jurisdiction shall be exercised. And the same principle of exemption from liability which obtains for errors committed in the ordinary prosecution of a suit where there is jurisdiction of both subject and person, applies in cases of this kind, and for the same reasons." (p. 352) To the same effect are: *Randall v. Brigham*, 7 Wall. 523; *Allec v. Reece*, 39 Fed. 341; *Lange v. Benedict*, 73 N. Y. 12; *Taylor v. Goodrich*, 25 Tex. Civ. App. 109; *Calhoun v. Little*, 43 L. R. A. (Ga.) 630; *Rush v. Buckley*, 100 Me. 322; *Thompson v. Jackson*, 93 Ia. 376; *McIntosh v. Bullard*, 129 S. W. (Ark.) 85; and *Fray v. Blackburn*, 3 B. & S. 576.

In *Alau v. Everett*, 7 Haw. 82, cited by the plaintiff, the rule relating to judges of courts of superior or general jurisdiction was not involved and was not considered. The action was against a police judge, a court of inferior and limited jurisdiction. It was held that the order complained of "was beyond his authority and in excess of his jurisdiction and therefore void" and the verdict for the plaintiff was not disturbed. The court evidently took the view favored by Cooley that "when inferior courts or judicial officers act without jurisdiction the law can give them no protection." Cooley, Torts, p. 419. The modern tendency seems to be to hold that the same considerations which lead to the exemption of judges of superior jurisdiction apply to those of inferior jurisdiction and that the rule is the same in both classes of cases. See, for example, *Cooke v. Bangs*, 31 Fed. 640; and *Allec v. Reece*, *Calhoun v. Little*, *Rush v. Buckley*, *McIntosh v. Bullard* and *Thompson v. Jackson*, supra. However that may be, there is nothing in the opinion in *Alau v. Everett* militating against the adoption of the rule laid down in *Bradley v. Fisher*.

The circuit court of the first circuit is a superior court, of record, with jurisdiction of appeals in civil and criminal cases from all the magistrates within the circuit and of all criminal

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offenses cognizable under the laws of the Territory committed within the circuit or transferred to it for trial by change of venue from some other circuit. R. L., §§1858 (amended by Act 23, 1909) and 1647. It has jurisdiction over all offenses committed in its circuit in violation of the statutes relating to emigrant agents and the soliciting of laborers to go beyond the limits of the Territory. The grand jury is a part of its machinery. It has power to subpoena witnesses to appear before the grand jury and also witnesses to appear at trials in the court itself; and to compel the attendance of such witnesses. Org. Act, §83; R. L., §1651. And its judges are authorized by statute, upon application of the attorney-general, to order that "witnesses material to the prosecution of any criminal indictment preferred, or about to be preferred, be bound by recognizance to appear and testify at the trial of such indictment, or that such witnesses be committed to jail for that purpose." R. L., §1899. The court and its judges have jurisdiction, further, of practically all civil causes at law, of all matters in equity, probate and divorce, and of the issuance of certain extraordinary writs. R. L., §§1647, 1658. The court is one, in short, of general jurisdiction. Defendant Whitney in this particular instance had jurisdiction over the prosecution of the alleged emigrant agents, of the proceedings before the grand jury relating to the matter, and of the securing of the attendance of witnesses before the grand jury and at the trial of any indictment that might be preferred. As held in the *Craig* case, he erred in issuing the order now under consideration; but within the rule of *Bradley v. Fisher*, the act was one merely in excess of his jurisdiction. There was not a "clear absence of all jurisdiction over the subject-matter." The determination of the question of whether the circumstances of the case were such as to justify and authorize the particular order requested of him was clearly a judicial duty imposed upon him by the law. In deciding it he acted as a judge and is entitled to the protection of the rule rendering judges immune from civil liability for damages.

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The attorney-general, likewise, is not liable. In his affidavit he merely presented to the court the facts that had come to his knowledge, with the request that the steps deemed by him authorized by law be taken to ensure the presence of a necessary witness. It is not claimed, and could not be successfully claimed, that he made any misrepresentation as to the facts or used any other improper means to secure the order. He had no control over the judge and could do no more than to present his view of the law and the facts and then leave the matter to the determination of the court. If the judge erred, the attorney-general cannot be held responsible. The language of the court in *Teal v. Fissel*, 28 Fed. 351, is applicable. "To hold the prosecutor responsible in such case, who simply discharges a public duty in making information of a supposed offense, would not only be grossly unjust to him, but would also be highly injurious to the public interests. What reason or excuse can be suggested for holding him responsible for the justice's mistake? He has nothing to do with issuing the writ; no authority or influence respecting it. It is the justice's duty to pass upon the facts, and determine whether a warrant shall issue. His functions are judicial. This is all so plain that no question could be raised respecting it but for the loose and inconsiderate expressions to be found in a few reported cases. * * *

The prosecutors did no more than lay the information before him. It is true, they say they went to obtain a warrant, and it is probable they told the justice that they desired the writ. But this is substantially what is done in every case. The prosecutor would not visit a justice if he did not think a warrant should issue; the object of his visit is to procure it. He has no control, however, over the justice, and knows that the warrant will issue or not as the justice may determine. If, through improper motives and improper means, he induces the justice to proceed, a different case is presented. Here the prosecutors honestly believed an offense had been committed, and that the information laid before him was truthful. They were therefore

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in no respect responsible for what followed." See also *Dusy v. Helm*, 59 Cal. 188; *Griffith v. Slinkard*, 146 Ind. 117; and *Marks v. Sullivan*, 9 Utah 12.

The same result must follow as to the sheriff. "The law protects an officer in the execution of process or a warrant, if it is fair and regular on its face. He is not to look beyond the warrant. He is not to exercise his judgment as to whether or not the process is valid. If it is in due form and issued by an official who apparently has jurisdiction of the case or the subject matter, the officer must obey its commands. In such case the officer is protected in the service of the process, although it may have in fact been issued wrongfully or without authority." *McIntosh v. Bullard*, 129 S. W. (Ark.) 85, 88. To the same effect are: *Cooley on Torts* (2nd ed.) p. 538; *Jennings v. Thompson*, 54 N. J. L. 55; *Hofschulte v. Doe*, 78 Fed. 436; and *Rush v. Buckley*, supra. See also *Thompson v. Jackson*, supra; *Hallock v. Dominy*, 69 N. Y. 238; and *Wheaton v. Beecher*, 49 Mich. 348.

It is contended that the sheriff did not heed the terms of the order in that he did not, as it is claimed, inform the plaintiff before bringing him ashore from the S. S. "Korea" that he, the plaintiff, was privileged to give a recognizance and thus escape imprisonment; and that therefore the writ does not afford the sheriff protection. The contention cannot be sustained. The primary and sole object of the order was, as is apparent on its face, to ensure the attendance of plaintiff as a witness in Honolulu. At the moment of the service of the order the steamer was about to cast loose from the dock and the plaintiff was on board with the avowed intention of departing for San Francisco. In view of the object of the order the sheriff cannot be held liable if he first secured the plaintiff's continued presence in Honolulu and then gave him the opportunity to furnish the recognizance. Upon the undisputed evidence there was not sufficient time on board for the arranging and furnishing of a satis-

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factory recognizance. Moreover the plaintiff's own testimony was that the sheriff informed him on board that he, the plaintiff, was wanted by the court as a witness and that the fact was that he was unable to give bail. He remained in custody four days and made no offer to enter into a recognizance. Under these circumstances the non-suit in favor of the sheriff was properly granted.

So, also, of defendants Bishop and Pfotenhauer. Their instructions to counsel were to act "within the law." Even if their attorneys joined in the request for the order and in the argument, before the attorney-general and the court, in support of the application, no liability exists. The reasoning with reference to the attorney-general applies. If the clients had made personal application to the attorney-general for the order the same result would follow.

The judgment is affirmed.

C. W. Ashford for plaintiff in error.

J. W. Cathcart and *F. W. Milverton* for defendants in error.

WALTER E. WALL v. HERMAN FOCKE.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED MAY 14, 1913.

DECIDED MAY 20, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

NEW TRIAL—*jury-waived cases—decision against weight of evidence.*

Upon a motion for a new trial in a jury-waived case the trial judge may set aside his own decision if convinced that it is contrary to the weight of the evidence.

Id.—*grounds of motion—necessity of determination.*

The granting of a motion for a new trial upon one only of the grounds named in the motion does not of itself import an overruling of the other grounds. In such a case every ground should be passed upon.

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OPINION OF THE COURT BY PERRY, J.

This is an action of assumpsit, upon three counts, for compensation for services rendered by the plaintiff in effecting a sale of land owned by plaintiff and defendant as tenants in common. The first count is on an express promise to pay to the plaintiff ten per cent. of the proceeds of the sale; the second is to the effect that by reason of the sale the plaintiff is entitled to compensation in a reasonable amount and that the sum claimed is reasonable; and the third is upon an account stated. Trial was had without a jury. The trial court in its decision ordering judgment for defendant, filed October 13, 1911, made no reference to the third count, apparently for the reason that there was no evidence in support of it, and found against the claim of an express contract and also against the claim of an understanding or expectation on the part of both parties that plaintiff would be compensated by the defendant in an amount not agreed upon. The plaintiff, six days later, during the same term and while the judgment remained wholly unsatisfied, moved for a new trial upon eight grounds, the first being "that the decision and judgment entered therein on the 13th day of October, A. D. 1911, is contrary to the law and to the evidence and the weight of evidence," the second to the sixth inclusive relating to alleged errors in the admission and rejection of evidence, the seventh being that the court erred in finding against the claim of an express agreement and the eighth that the court erred in finding "that said plaintiff was not entitled to account for his services under the *quantum meruit* count." The motion was granted, the trial judge, after reciting the substance of his first decision, concluding as follows: "There can be no doubt that defendant did know that plaintiff was using effort and time in the sale of the common land, and that defendant acquiesced in such effort and expenditure of time. Nor can it be doubted that defendant was benefited by the sale of the land, nor that the sale was consummated by the efforts of Wall, the plaintiff alone. Under such circumstances, I am of the opinion

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that the efforts of plaintiff were not in contemplation of joint or common tenancy, were without his duties as co-tenant of the defendant, and being acquiesced in by the defendant and the defendant having been benefited thereby, and that therefore the plaintiff is entitled to judgment on his count of *quantum meruit*." Exceptions to this ruling were sustained and the order granting a new trial set aside. Ante, 399. This court in passing upon the exceptions held that there was no evidence in support of the third count; that there was ample evidence to support the findings against the claim of an express contract and against the claim of an understanding or expectation on the part of both parties that the plaintiff would be compensated by defendant in an amount not agreed upon; that those findings remained unreversed in the trial court's second written opinion; and that the four facts relied upon by the trial court, namely, that defendant had knowledge of plaintiff's efforts, that he acquiesced in those efforts, that he was benefited by the sale and that the sale was consummated by the plaintiff alone, were not of themselves sufficient to give rise to an obligation on the defendant's part to pay. The plaintiff thereupon moved in the circuit court that his motion for a new trial be set for further hearing, contending that no ruling had been made, either by the trial court or by this court, upon the first ground of the motion. The motion to set was denied, the trial judge being of the opinion that "the decision of the supreme court went to the entire merits of the motion" (for a new trial) "and that without any order to that effect no further proceedings are to be had before this" (that) "court on the original motion for a new trial." The case now comes to this court upon exceptions to the denial of the motion to set.

The first ground of the motion for a new trial remains in part undisposed of. The trial court held that its original decision was contrary to law in the one respect mentioned. This court took the opposite view and ruled further that the findings

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of fact were amply supported by the evidence, or, in other words, that the decision was not contrary to the evidence. This court, however, did not consider whether the decision was contrary to the weight of the evidence. In the absence of a jury, it was within the province of the trial judge alone to determine questions concerning the credibility of the witnesses and the weight of the evidence, and if, in passing on the motion, he had ruled either that his original findings were or that they were not contrary to the weight of the evidence, this court could say merely whether there was or was not evidence to support the ruling. It has been repeatedly held in this jurisdiction that the jury, or, when a jury is waived, the trial judge is the final arbiter of the weight of the evidence and that this court cannot disturb a verdict or decision if there is evidence sufficient in law to support it. See, for example, *Smith v. Hamakua Mill Co.*, 14 Haw. 669 and *Lillis v. Carty*, 14 Haw. 132. It is equally well established that the judge presiding at the trial may not set aside the verdict of a jury on the ground that, in his opinion, it is contrary to the weight of the evidence. *Robinson v. Rapid Transit Co.*, 20 Haw. 426; *Ahmi v. Cornwell*, 14 Haw. 301. When, however, the trial is had without the intervention of a jury, the reason for the rule fails in so far as a review by the trial judge is concerned and the rule itself does not apply. The judge, having himself made the findings of fact, may, subject to proper limitations as to time and other circumstances, reconsider the evidence and if convinced that his findings were erroneous set them aside. When a decision is thus set aside on the ground that the findings are against the weight of the evidence the trial court may, in its discretion, as justice may require, render judgment for the party originally unsuccessful or admit further evidence and then proceed to judgment or grant a trial *de novo*. See *Hawkins v. Reichert*, 28 Cal. 535; *Cauhape v. Bank*, 118 Cal. 82; *Robinson v. Commissioners*, 12 Md. 132; *Underwood v. Sledge*, 27 Ark. 295; and *Taylor v. Gribble*, 33 S. W. (Tex.) 765.

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In the case at bar the trial judge has not expressly ruled upon the claim, advanced as a part of the first ground of the motion for a new trial, that the decision was against the weight of the evidence. It does appear, indirectly, in his written opinion on the motion, that he overruled the contention that the finding that there was no express contract for a commission of ten per cent. was contrary to the weight of the evidence, for the granting of the new trial was based on the ground that plaintiff was entitled to reasonable compensation for his services. The ruling as made clearly negatived the idea of the existence of an express contract. It was necessarily a reiteration of the finding that there was not an express contract. But not even by inference does it appear that the judge passed upon the contention that the finding against the claim of a mutual understanding or expectation that plaintiff would be compensated in a reasonable sum for his services was contrary to the weight of the evidence. The statement by the trial court that upon the four facts enumerated the plaintiff was entitled to recover on a *quantum meruit* left untouched the contention just referred to. The statement related to a legal obligation which the trial court regarded as arising out of the four facts mentioned, while the contention was that a finding of a certain other fact was against the weight of the evidence.

The overruling of a motion for a new trial necessarily imports the overruling of every ground named in the motion. The granting, however, of such a motion upon one of the grounds named does not of itself, at least in the absence of a statute, indicate that the remaining grounds are overruled but is entirely consistent with the view that they were not considered. In such cases the practice of leaving undetermined some of the grounds of the motion is likely to involve further review proceedings and duplicate appeals and is therefore disapproved. See *Bierce v. Waterhouse*, 219 U. S. 320, 322.

The exceptions are sustained, the order denying the motion

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to set is reversed and the cause is remanded to the circuit court with directions to hear and determine the motion for a new trial in so far as it may be claimed, under the first ground thereof, that the finding that there was not an understanding or expectation on the part of both parties that the plaintiff would be compensated by defendant in an amount not agreed upon is contrary to the weight of the evidence.

W. B. Lymer (Thompson, Wilder, Watson & Lymer on the brief) for plaintiff.

I. M. Stainback (Holmes, Stanley & Olson on the brief) for defendant.

JOHN D. SPRECKELS AND ADOLPH B. SPRECKELS
v. CLAUS A. SPRECKELS AND RUDOLPH SPRECKELS, TRUSTEES UNDER THE WILL AND OF THE ESTATE OF CLAUS SPRECKELS, LATE OF SAN FRANCISCO, STATE OF CALIFORNIA, DECEASED, CLAUS A. SPRECKELS, RUDOLPH SPRECKELS, EMMA C. FERRIS, JOHN FERRIS, SCHUMAN CARRIAGE COMPANY, LIMITED, ASSOCIATED GARAGE, LIMITED, HAWAIIAN STAR NEWSPAPER ASSOCIATION, LIMITED, GUSTAV BIORKMAN, J. H. SCHNACK, W. O. BARNHARDT, ALBERT C. KIECHLER, M. T. MARSHALL, JOHN NEILL.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

ARGUED MAY 12, 13, 1913.

DECIDED MAY 26, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

WILLS—devise of real property construed according to lex rei sitae.

The construction and effect of a devise of real property situated in a jurisdiction other than that of the testator's domicile is to

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be determined in accordance with the law of the jurisdiction where the land is situated.

SAME—devise of property in trust to divide and convey—vested interests.

A testator devised and bequeathed all his estate to trustees in trust to pay the net income thereof to his wife during her natural life; and upon her death (or upon the death of the testator in case he should survive his wife) to divide the estate into three equal parts when one of such parts should be forthwith assigned, transferred, set over and delivered by them to his son C., same to be and become his absolutely and forever, and another of such parts similarly to his son R.; and to pay the net income from the remaining equal third part of the estate to his daughter E. during her natural life, and upon her death to pay over the principal to E.'s children and grand children. The wife survived the testator and the sons and daughter survived their mother. Held, that the trustees took the legal title to the entire estate in trust for the purposes stated in the will, and that the will imposed upon the trustees the active duty, upon the death of the widow, to divide the estate into three equal parts and to assign, transfer and convey one of such parts to each of the two sons; that the testator did not intend that the equitable interests of the sons were to remain contingent until the division and transfer of the property by the trustees but that those interests were to become vested at least upon the death of the widow; that the fact that the estate was a large one which it might take a long time to divide would not prevent those interests from vesting in the sons in undivided shares subject to the division and transfer by the trustees; and that the will did not violate the rule against perpetuities.

SAME—effect of different constructions—trust void in domiciliary jurisdiction.

Where a trust to convey real estate created by will is valid according to the law of Hawaii and is operative as to real estate situated in Hawaii, it will not be held ineffective or void so as to cause the property to pass as intestate estate upon the ground that such a trust is not permitted by the law of California, in which State the testator resided and wherein the bulk of his property was situated, and the will has been construed by the supreme court of that State as having given the beneficiaries legal estates by direct devises. In Hawaii such a trust will operate

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according to the intention of the testator notwithstanding the construction placed upon the will by the California court.

OPINION OF THE COURT BY ROBERTSON, C.J.

In an action to quiet title to certain lands situate in the city and county of Honolulu, Territory of Hawaii, wherein the defendants-in-error were plaintiffs and the plaintiffs-in-error were defendants, the following facts were agreed upon:

"That Claus Spreckels, late of San Francisco, State of California, named in the complaint herein, died in San Francisco, of which place he was a resident, on December 26, 1908. That at the time of his death he owned in fee simple all the property, being Lots 1, 2 and 3, described in the complaint herein. That he left surviving him a widow, Anna C. Spreckels, and five children, viz: John D. and Adolph B. Spreckels, plaintiffs herein, Claus A. and Rudolph Spreckels, and Emma C. Ferris, defendants herein, and no other children or issue of deceased children. That said widow, Anna C. Spreckels, died on the 15th day of February, 1910. That no dower interest in said property was ever admeasured. That all of said five children are now surviving. That Claus Spreckels left a will, a copy of which is annexed hereto, which has been duly admitted to probate in the State of California, and to ancillary probate in the Territory of Hawaii. That no distribution of any of said property described in said complaint has yet been made under said will. That Anna C. Spreckels left a will, a copy of which is hereto annexed, which has been duly admitted to probate in the State of California and to ancillary probate in the Territory of Hawaii. That said plaintiffs, John D. and Adolph B. Spreckels, have not in any way transferred or incumbered, and that they now own whatever interests, if any, in said property they respectively received or acquired, or became entitled to, as heirs of said Claus Spreckels or otherwise at or subsequent to the death of said Claus Spreckels. That Claus Spreckels, at the time of his death, owned an estate valued in round numbers at \$10,000,000. of multiform character, one-half of which consisted of real property situated in California. That the said Claus A. Spreckels, at the time of the death of said Claus Spreckels, had, and at the present time has, issue, to wit, a daughter living; that the said Rudolph Spreckels, at the time of

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the death of said Claus Spreckels, and at the present time has, issue, to wit, a son and two daughters living; and that the said Emma C. Ferris was at the time of the death of said Claus Spreckels, without issue, and at the present time has issue, to wit, a daughter living. That the law of California, viz: the Civil Code provides: Upon the death of the husband, one-half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition, goes to his descendants, equally, if such descendants are in the same degree of kindred to the decedent; otherwise, according to the right of representation; and in the absence of both such disposition and such descendants, is subject to distribution in the same manner as the separate property of the husband. In case of the dissolution of the community by the death of the husband, the entire community property is equally subject to his debts, the family allowance, and the charges and expenses of administration."

The will of Claus Spreckels is as follows: "I, Claus Spreckels, a citizen of the State of California, and a resident of the City of San Francisco in said state, now present in the city, county and state of New York, being of sound and disposing mind, and not under restraint or undue influence, do make, publish and declare this to be my Last Will and Testament, hereby revoking all other Wills by me made.

"First: I declare that all the estate, whereof I may die possessed, is the community property of my wife, Anna Christina Spreckels, and myself.

"Second: I hereby give, devise and bequeath unto my Trustees hereinafter named, all my estate, real, personal and mixed, of every nature, kind and description, wherever situate and however held, which is or may be subject to my testamentary disposition at the time of my death, to have and to hold the same, in trust, nevertheless, for the uses and purposes, with the powers and in the manner hereinafter mentioned, namely, to wit: (a) To pay over the net annual income thereof to my wife during the term of her natural life. (b) Upon the death of my said wife, or upon my death if she be not then surviving, to divide said estate into three equal parts, when one of said parts shall be forthwith assigned, transferred, set over and delivered by my said Trustees to my son Claus A. Spreckels, and the same shall be and become his absolutely and forever, and

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another of said equal third parts shall be forthwith assigned, transferred, set over and delivered by my said Trustees to my son Rudolph Spreckels, and the same shall be and become his absolutely and forever. (c) To pay over the net annual income derived from the remaining equal third part of my estate to my daughter, Emma C. Ferris of Kingswood, England, wife of John Ferris, during her natural life, upon her receipt without anticipation, and the same shall not be liable for her debts. Upon the death of my said daughter Emma, to pay over the principal of said one-third part of my estate, with all accumulations of the income therefrom, to her children then living, and so that each child shall receive an equal share thereof, and the same shall become his or hers absolutely and forever. Children of her deceased children shall, however, take the share which the parent would have taken had he or she survived my said daughter, and the same shall be divided between said children share and share alike. Upon the death of my said daughter without child, children or grand children her surviving, the Trustees shall pay over the principal of said one-third part of my estate, with all accumulations of income therefrom, to my said sons Claus A. Spreckels and Rudolph Spreckels, share and share alike, and the same shall become theirs absolutely and forever.

"Third: If my said son Claus A. Spreckels shall not be living at the time of my death or surviving me be not living at the time of my wife's death, then all the legacies and devises given to him by this Will shall go to his issue, to him in lawful wedlock born, share and share alike, and the same shall be and become theirs absolutely and forever. If my said son Rudolph Spreckels shall not be living at the time of my death, or surviving me be not living at the time of my wife's death, then all the legacies and devises given to him by this Will shall go to his issue, to him in lawful wedlock born, share and share alike, and the same shall be and become theirs absolutely and forever.

"Fourth: I make no provision in this Will for my sons John D. Spreckels and Adolph B. Spreckels for the reason that I have already given them a large part of my estate.

"Fifth: I hereby authorize and empower my Trustees hereinafter named, to invest and re-invest the trust funds hereinbefore provided for in any securities which are approved by

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my said wife and by them during her lifetime, in case she survive me, and after her death, in any securities which said Trustees deem best, whether the same are or are not investments to which Executors and Trustees are by law limited in making investments, and to change or vary investments from time to time as they may deem best. I authorize and empower my Executors and Trustees hereinafter named, to hold and continue in their discretion, any security in which any of my property may be found invested at the time of my death, my intent being that they shall be absolved and discharged from the absolute legal duty of converting my estate into money, and that they shall not be liable for any shrinkage in value by reason of the exercise of the discretion hereby reposed in them.

"Sixth: I authorize and empower my Executors and Trustees hereinafter named in their discretion to sell and dispose of any and all of my property, real or personal, wherever situate and however held, either at public or private sale, and at such time or times and upon such terms as may seem to them meet and advisable, and to give to the purchaser or purchasers of any of my said property all deeds, bills of sale and other muniments of title which may be expedient or necessary.

"Seventh: I nominate, constitute and appoint my sons Claus A. Spreckels and Rudolph Spreckels as Executors of this my last Will and Testament, and as Trustees of any and all trusts herein created, and I direct and request that no bond or other security be required of them as such Executors or Trustees, or in any capacity in which they may act under this Will."

Anna C. Spreckels, by her will, devised and bequeathed her estate to her sons Claus A. and Rudolph and her daughter Emma C. Ferris, share and share alike, and stated that she had omitted making any provision for her sons John D. and Adolph B. for the reason that her deceased husband had, prior to his death, given and advanced to them a large part of his estate, and for other reasons satisfactory to her.

The circuit court, jury waived, sustained the plaintiffs' contention that the will created a trust to divide and convey, and held that the interests given by clauses "(b)" and "(c)" of the second paragraph of the will were neither direct devises nor vested interests but were contingent interests which were not

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to become vested until at the completion of the division of the estate into three equal parts by the trustees and that as such division was not required to be made within twenty-one years after the death of the testator's widow, the trust was void under the rule against perpetuities. The plaintiffs claimed title to two-fifths of the land in dispute upon the theory that on the death of their mother the title to the land passed as intestate property to the five children, and judgment for the plaintiffs was entered in the court below in accordance with their claim.

The will of Claus Spreckels was considered and its validity pronounced by the supreme court of California in *Estate of Spreckels*, 162 Cal. 559. It was there held that the estate was devised to the trustees in trust to pay the income to the testator's wife for life; that upon her death one-third of the estate was devised to Claus A. Spreckels, or, if he should be not then living, to his issue, and another one-third to Rudolph Spreckels, or his issue; that the remaining third would rest with the trustees upon trust to pay the income to Mrs. Ferris during her life, and upon her death that third will go to her children and grand-children, or to Claus A. and Rudolph; that the devises of the equal third parts to Claus A., Rudolph, and the trustees for Mrs. Ferris and her children, were direct devises of undivided legal estates which became vested on the death of Mrs. Spreckels; that the will did not create a trust to convey or partition real estate; and that there was no undue suspension of the power of alienation. The court found it unnecessary to consider the contention that even if the direction to divide imposed upon the trustees the duty to partition the estate into three portions of equal value, the will nevertheless contains direct devises by implication to the persons intended by the testator to be his ultimate beneficiaries, or to examine the point that the supposed invalidity of the trust with respect to the realty carries with it, as a part of a single scheme, the failure of the provisions in so far as they affect personal property.

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The first point which requires our attention is with reference to the decision of the supreme court of California and what influence it should have upon the decision of this court. On behalf of the plaintiffs-in-error it is urged that this court, though not obliged to follow that decision, ought to follow it because it is intrinsically sound and just. We have profound respect for the able supreme court of California and hold its opinions in high regard, and were it not for the important fact that the law of California materially differs from the law of this Territory with reference to trusts to convey real property we should hesitate long before departing from the line of reasoning adopted by that court in construing the will in hand. In this Territory there are no statutory provisions corresponding to those of the Civil Code of California which have been held to prevent the creation of a trust to convey real property to beneficiaries (*Estate of Fair*, 132 Cal. 523), and which the present defendants-in-error, before the California court, contended would render nugatory the provisions of clause "(b)" of the second paragraph of this will. Being confronted with the statute the supreme court of California felt obliged, as it intimated in its opinion (p. 569), to make a keen "search for words which might save the testamentary attempt from failure." A careful reading of the opinion inclines us to think that the court would have held that the intention of Claus Spreckels was to create a trust to divide and convey real estate were such a trust lawful in California. The court said (p. 568), "But wherever the court has been called upon to consider a will which contained, in addition to words which, standing alone, would be deemed to create a trust to convey, some expression which might be operative to pass the title directly from the testator to the beneficiary, the ruling has been that the will was to be construed as making a direct devise, and such devise has been given effect, in disregard of the words importing an invalid trust," and again (p. 573), "But when words which by themselves import an unlawful trust to convey are joined with other

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words which are sufficient to operate as a direct devise of the interest, the direct devise is not destroyed by the fact that the testator may have attempted to provide in addition for an unlawful method of passing title through trustees." And an underlying principle upon which the court proceeded is shown by the quotation made from the case of *Estate of Heywood*, 148 Cal. 184, 191, that, "It is only when the language actually used by the testator will admit of no other reasonable construction than that it declares (creates) an invalid trust that a court will declare this to be its effect." But as to the real estate situate in Hawaii, the law of this Territory governs the transfer of its title. The construction and effect of this will, and the validity of its provisions with respect to the land in dispute must be determined with reference to the law of Hawaii, and this court must examine the will to ascertain the intention of the testator and give effect to that intention if it be not repugnant to the law of this jurisdiction irrespective of what may have been held in California. *DeVaughn v. Hutchinson*, 165 U. S. 566, 570; *Clarke v. Clarke*, 178 U. S. 186, 190; *Ball v. Phelan*, 23 L. R. A. N. S. (Miss.) 895, 907; *Peet v. Peet*, 229 Ill. 341, 348; *Campbell-Kawananakoa v. Campbell*, 152 Cal. 201, 206. In *Jacobs v. Whitney*, 205 Mass. 477, 480, it was said, "The testator having been domiciled in Philadelphia when the will was drawn and executed, and dying there, the will must be interpreted as it would be interpreted there, unless the circumstances under which it was executed or the nature of the will itself requires a different construction. * * * * This rule applies with full force and effect to personal property wherever situated. * * * * With regard however to real property situated in another jurisdiction, another rule applies. While the will is presumed in the absence of anything to the contrary to have been drawn in accordance with the law of the testator's domicile and will be interpreted accordingly, its effect and validity in respect to the disposition of real property so situated, or the creation of any interest therein will depend upon the *lex rei*

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sitae." The qualification to the rule noticed in *Ball v. Phelan*, and applied in some cases cited by the plaintiffs-in-error, that the courts of the jurisdiction where the property is situated, in construing a will made at the testator's domicil, in another jurisdiction, will adopt a settled judicial meaning which the courts of the jurisdiction of domicil have given to technical words therein so that such meaning has become a rule of property in that jurisdiction, does not apply here. The questions presented do not involve the construction of technical words which have a settled meaning in California. They are broader questions which concern the construction and validity of clause "(b)" as a whole, and the effect on all of the provisions of the will relating to the period after the death of Mrs. Spreckels of the rulings made by the supreme court of California. In dealing with these questions we are required to have in mind the general rules of construction which, when applied to wills requiring construction, are designed to throw light upon the real intention of the testator, prominent among which are these: that the words in a will are presumed to have been used in their primary and ordinary sense; that of two reasonable modes of construction one of which will lead to intestacy and the other to a valid disposition the latter will be accepted; and that an estate or interest given is to be regarded as vested unless it clearly appears that a contingent estate or interest was intended.

The defendants-in-error base their claim to the land in dispute upon the theory of the invalidity of the will as applied to the real estate in Hawaii, the contentions of their counsel being, in brief, first, that the beneficial interests given by the will subsequent to the death of the testator's widow have not vested and cannot vest either as legal or equitable estates until after a complete and final division of the estate into three equal parts by the trustees under the directions contained in clause "(b)," and that since these future interests, according to the terms of the will, must remain contingent until the completion of the

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partition which would require an indefinite length of time to effect, they may not become vested until a period beyond the limit allowed by the rule against perpetuities and are therefore void, and, secondly, that the trust scheme of the testator having been "fatally mutilated and frustrated" by the decision of the California supreme court, the trust should be held void as to the remaining fragment of the trust estate also, and therefore there is an intestacy as to the real estate in Hawaii.

It is apparent that the ultimate conclusion to be reached by this court upon the questions presented here may lead to a result different from that introduced by the decision of the supreme court of California without questioning in any way the correctness of that court's decision upon the questions disposed of by it under the law of California.

The testator, after declaring all his estate to be the community property of his wife and himself (which, by the way, was not the fact as to his Hawaiian property) devised and bequeathed to his trustees all his estate, real, personal and mixed, wherever situate and however held, the same being subject to his testamentary disposition, in trust to (a) pay the net income thereof to his wife during the term of her natural life; (b) upon the death of his wife to divide said estate into three equal parts, when one of said equal third parts shall be forthwith assigned, transferred, set over and delivered by the trustees to his son Claus A., same to be and become his absolutely and forever, and another of said parts shall be forthwith assigned, transferred, set over and delivered by the trustees to his son Rudolph, same to be and become his absolutely and forever; and (c) to pay the net income from the remaining equal third part of the estate to his daughter Emma C. Ferris during her natural life, and upon her death to dispose of the principal as directed. Giving to the words used by the testator their ordinary and natural import it seems clear to us that his intention was not to give his sons immediate legal estates in the respective third parts of the property, but was to pass the legal title to the whole of the

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estate to the trustees upon trust to pay the income to his wife during her lifetime if she should survive him and on her death (or on his death in case he should survive her) to divide the estate into three equal parts and to assign, transfer and deliver to each of the two sons one of such parts. The words "assign," "set over" and "deliver" are appropriate words for the passing of title to personal property, and the word "transfer" is as broad, if not broader, than "convey" and is appropriate for the passing of title to real as well as personal property. *Estate of Spreckels*, 162 Cal. at p. 572; *In re Thompson's Estate*, 1 N. Y. S. 213, 215; *Matter of Coolidge*, 83 N. Y. S. 299, 305; *Whalon v. Canal Co.*, 11 Wyo. 313, 347; *Lembeck etc. Brewing Co. v. Kelly*, 63 N. J. E. 401, 408; *Lambert v. Smith*, 9 Ore. 185, 193. And, in other connections, the word "transfer" has been given a wide meaning, thus, under the bankruptcy act, "a transfer of property includes the giving or conveying anything of value." *Pirie v. Chicago T. & T. Co.*, 182 U. S. 438, 443. The express direction to the trustees is to "divide said estate," and the assignment and transfer to each son is directed to be made "by my said trustees." The gift contained in clause "(c)" to the testator's daughter is not of a third of the net income of the whole estate but of "the net annual income derived from the remaining equal third part of my estate." All this, we think, goes to show that the trustees took the legal title with important powers, and that the contention of the defendants-in-error that clause "(b)" imposed upon the trustees the active duty to divide the estate into three equal parts and to convey one of such parts in severalty to each of the two sons is sound, though we are not required to specifically pass upon the contention of the plaintiffs-in-error that if conveyances are required to be made by the trustees to each of the sons individually those conveyances may be of undivided third parts of the estate. It is unnecessary to consider in this case any question as to how the trustees of this estate are to perform the duties imposed upon them by the will.

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We do not sustain the further contention of the defendants-in-error that the equitable interests thus given to the two sons were intended to be contingent upon the division and conveyance of the property. We find nothing in the will which discloses an intention on the part of the testator that these interests should be or remain contingent, if at all, beyond the lifetime of his widow, she surviving him. There is no interregnum, the direction being to divide the estate "upon the death of my said wife" and to "forthwith" assign and transfer the equal third parts to each of the sons. There is no mention of the income which would accrue pending the division and transfer. No provision was made for the possible case of the death of either of the sons after the death of Mrs. Spreckels and before division and transfer. And as the only provision made for Mrs. Ferris is that contained in clause "(c)" it would be an unreasonable view to take that the testator intended that her right to an income from the estate was to be postponed until a physical division of the whole estate could be effected, yet if clause "(b)" gave only such contingent interests to the sons it would follow that the daughter's interest under clause "(c)" was likewise contingent. The directions to divide and to assign and transfer, and the declaration that the equal third part shall "be and become" the absolute property of the sons relate to the event of the death of the wife, she surviving the testator. The two sons having survived their mother it is of no practical importance whether the interests given them under clause "(b)" are to be regarded as having vested upon the death of the testator, defeasible in the event of death during the lifetime of the mother, as contended for by counsel for the plaintiffs-in-error, or whether, as opposing counsel claim, the interests of the sons remained contingent until the arrival of the time for the making of the division and transfer, which time they assume was not designated by the testator. The framing of this assumption has led counsel for the defendants-in-error to what we are satisfied is a wrong conclusion, for, as already shown, the will

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has fixed the time for the division and transfer as on the death of the widow. Counsel invoke the rule that where there is no gift but in a direction to pay or convey futurity is annexed to the substance of the gift and vesting is suspended until the time shall arrive at which the payment or conveyance is to be made, but upon the application of that rule the interests of the sons must be held to have become vested on the death of their mother, that being the event designated in the will for the division and transfer. *Lewisohn v. Henry*, 179 N. Y. 352, 361, 362; *Andrews v. Rice*, 53 Conn. 566, 570. That the estate was a large one which it might take a long time to divide would not prevent the equitable interests given by clause "(b)" from vesting at the time specified. Those interests vested, in accordance with the manifest intention of the testator, in undivided shares pending the division and transfer by the trustees. *Manice v. Manice*, 43 N. Y. 303, 373.

Counsel for the defendants-in-error read clause "(b)" as though its first word were "after" instead of "upon," and then they argue that because the will does not prescribe a time at which the division and transfer of the property must take place within the period allowed by the rule against perpetuities for the vesting of estates the clause is void *in toto*. But, as counsel concede, if the interests given by that clause are not contingent upon a division and transfer of the property their entire claim with respect to this branch of the case must inevitably fall to the ground. They say in their brief, "We admit frankly that the rule against perpetuities would be satisfied by the vesting of the gifts in Claus A. and Rudolph Spreckels as either legal or equitable estates immediately upon the death of the widow, and that we must therefore prove that these gifts do not vest even as equitable estates until the completion of the division of the trust estate." Having found, as above stated, that the interests given by clause "(b)" became vested in the beneficiaries at least upon the death of the widow it is not necessary to further pursue the contentions of counsel upon this branch of the case.

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Clause "(b)," in our opinion, does not violate the rule against perpetuities.

The final claim advanced by counsel for defendants-in-error is thus, in part, set forth in their brief: "Under the *Spreckels* will there is but a single trust operating upon all the property of the estate of every nature and description and 'wherever situated,' as a collective unity and involving a unitary scheme, the very essence of which requires the trustees" to administer the trust as directed by the will. That the decision of the supreme court of California "has removed from the trust the bulk of the testator's property consisting of all the real estate situated in California and all the personal property wherever situated. * * * * The unitary and discretionary trust scheme of the testator having been fatally mutilated and frustrated by this decision, the provisions of the trust should not be enforced as to the remaining fragments of the trust estate, that is, the Hawaiian realty, or the Hawaiian realty plus the realty, if any, situated elsewhere than in California and in Hawaii; there is, therefore, an intestacy as to the Hawaiian realty." The contention, in a word, is that the beneficiaries named in clause "(b)" should, with reference to the real estate in Hawaii, including of course the land in dispute, take nothing under the will because the supreme court of California has held, with reference to the real estate in California, that they took by direct devises independent of any trust. The statement of the proposition would seem to carry its own refutation. To us it appears to be unjust, illogical and unsound. If the trust should be held to be ineffective as to the Hawaiian realty for the reason assigned it would seem more reasonable to hold that the objects of the testator's bounty should take the property free of the trust than that they should not take under the will at all. However, we think a complete answer to the contention is found in the ruling made on the first point discussed in this opinion which followed the argument of counsel for the defendants-in-error wherein they invoked the "principle firmly established

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that to the law of the state in which the land is situated we must look for the rules which govern its descent, alienation and transfer, and for the effect and construction of wills and other conveyances," and said that "the Hawaiian courts in passing upon the title to real estate situated in Hawaii are free to construe the Spreckels will as they think right despite the California decision." This principle, which, in practical application may sometimes bring about unforeseen consequences, followed to its logical conclusion in this case, requires us to uphold and give effect to the trust which the testator created, and which is valid under the law of this Territory and operative as to the land in dispute. The plaintiffs proved no right, title or interest in the land in question in themselves.

The judgment of the circuit court is vacated and set aside. Judgment for the defendants will be entered in this court.

D. L. Withington and Henry Holmes (Castle & Withington on the brief) for plaintiffs-in-error.

R. B. Anderson (Prosser, Anderson & Marx and S. E. Hannestad on the brief) for defendants-in-error.

**APOKAA SUGAR COMPANY, LIMITED, v. CHARLES
T. WILDER, TAX ASSESSOR, FIRST TAXATION
DIVISION, TERRITORY OF HAWAII.**

SUBMISSION UPON AGREED STATEMENT OF FACTS.

ARGUED MAY 26, 1913.

DECIDED JUNE 3, 1913.

**PERRY AND DE BOLT, JJ., AND CIRCUIT JUDGE COOPER IN
PLACE OF ROBERTSON, C.J.**

STATUTES—prospective and retrospective—construction.

The rule that a statute is to be construed as having only a prospective and not a retrospective operation has no application to a statute where the legislature in plain and unambiguous terms has

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expressly made it retrospective. With such a statute there is no room for construction.

TAXATION—*rate on income derived during the year 1912.*

The rate of the so-called conservation tax on income derived during the year 1912 was reduced from two per cent. to one per cent. by Act 164, Laws of 1913, the act being expressly made retrospective in its operation whereby the year 1912 was, in effect, designated as the first taxation period thereunder.

OPINION OF THE COURT BY DE BOLT, J.

(Perry, J., Dissenting.)

This is a case submitted by the parties upon an agreed statement of facts. The facts thus agreed upon and signed by the parties are as follows:

"That the said Apokaa Sugar Company, Limited, is and was at all times mentioned herein a corporation duly organized and existing under the laws of the Territory, doing business for profit, and having its usual place of business within said First Taxation Division of the Territory of Hawaii.

"That the said Charles T. Wilder is and was at all times herein mentioned the Assessor of said First Taxation Division.

"That in the month of January, 1913, the said Apokaa Sugar Company, Limited, made a full return, verified by the oath of its duly empowered officers, in the form prescribed by the Treasurer of the Territory for the taxation period ending December 31, 1912, of all the matters required by Section 1282 of the Revised Laws of Hawaii as amended by Act 87 of the Session Laws of 1905.

"That there has been duly levied and assessed on the net profit or income of said corporation, above actual operating and business expenses, derived during said taxation period, and from all property owned and all business carried on by said corporation in the Territory of Hawaii, a tax of two per cent. on said net profit or income as shown by said return, the said net profit or income being the sum of \$16,530 and the said tax being the sum of \$330.60; and also, in addition to said tax of two per cent. levied and assessed upon said net profit or income as aforesaid, there has been duly levied and assessed, under the provisions of Act 33 of the Laws of 1909 as amended by Act 147 of the Laws of 1911, a further tax of two per cent. on the net

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profit or income of said corporation, amounting to the sum of \$330.60, said tax being so levied as a special fund to promote the conservation and development of the natural resources of the Territory through immigration and other means, and being hereafter, for greater clearness, referred to as the 'Conservation Tax.'

"That such assessments and levies were made in accordance with law, unless the amount of said last mentioned tax, levied by virtue of the provisions of Act 33 of the Laws of 1909 as amended by Act 147 of the Laws of 1911, and known as the 'Conservation Tax,' is affected by the provisions of Act 164 of the Laws of 1913, approved on the 30th day of April, 1913.

"That on the 14th day of May, 1913, the said Apokaa Sugar Company, Limited, on the demand of the said Charles T. Wilder, Assessor, and to prevent the penalty provided by law for delinquent taxes, paid the first installment of both of said taxes; but paid one-half, viz., the sum of \$82.65, of said first installment of said 'Conservation Tax' under protest, and, at the same time, filed a protest and notice under the provisions of Section 1512A of the Revised Laws (a copy of which is hereto annexed and made a part hereof).

"That the said Apokaa Sugar Company, Limited, demands from the said Charles T. Wilder, Assessor, the repayment of said sum of \$82.65, on the ground that the same was illegally levied and exacted from it by the said Charles T. Wilder, and asks judgment against him for said amount.

"The question submitted to this court for decision is whether the said Act 33 of the Laws of 1909 as amended by Act 147 of the Laws of 1911 has been modified by said Act 164 of the Laws of 1913 so that the rate of said 'Conservation Tax' is one per cent. instead of two per cent. upon the net profit or income of said corporation derived during the taxation period ending on the 31st day of December, 1912."

The sole question presented by the submission for determination is, whether the so-called conservation tax on the income of the Apokaa Sugar Company derived during the year immediately preceding the first day of January 1913, i. e., during the year 1912, shall be assessed at the rate of one per cent., as contended for by the corporation, or at the rate of two per cent., as contended for by the assessor.

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The first legislative enactment in this Territory upon the subject now under consideration was Act 33, Laws of 1909, whereby there was imposed an additional tax on incomes over a certain sum which, when collected, was to be used, three-fourths for the encouragement of immigration and one-fourth for the development, conservation, improvement and utilization of the natural resources of the Territory. This tax has generally been referred to and called the "Conservation Tax." Under the provisions of section 3 of the act mentioned, which section has not been amended, the taxation period was defined as "the year immediately preceding the first day of January of each year in which such tax is payable. Provided, that the first taxation period under this Act shall be the year immediately preceding the first day of January, 1909." Hence, the first taxation period under the act was the year 1908, and the tax for that period, payable in 1909, was fixed at the rate of one per cent. and at the rate of two per cent. for subsequent periods. Section 6 of the act provided as follows: "This Act shall be in effect from the date of its approval, and relate retrospectively to give full effect to the provisions herein contained with respect to taxes for the first taxation period hereunder; and shall continue in force to and until the thirty-first day of December, 1911; provided, that all taxes assessed under the provisions of this Act which shall remain unpaid at the end of said period shall be subject to collection and enforcement in the same manner as though all the provisions of this Act were still in force with respect thereto."

Act 147, Laws of 1911, which amended section 6 of Act 33 by substituting 1913 for 1911, provided as follows: "This Act shall be in effect from the date of its approval and relate retrospectively to give full effect to the provisions herein contained with respect to taxes for the first taxation period hereunder; and shall continue in full force to and until the 31st day of December, 1913; provided, that all taxes assessed under the provisions of this Act which shall remain unpaid at the end

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of said period shall be subject to collection and enforcement in the same manner as though all the provisions of this Act were still in force with respect thereto."

Act 164, Laws of 1913, approved April 30, 1913, amended sections 1 and 2 of Act 33 by reducing the rate of the conservation tax to one per cent. and amended section 6 thereof to read as follows: "This Act shall be in effect from the date of its approval, and relate retrospectively to give full effect to the provisions herein contained with respect to taxes for the first taxation period hereunder; and shall continue in force to and until the 31st day of December, 1915; provided, that all taxes assessed under the provisions of this Act which shall remain unpaid at the end of said period shall be subject to collection and enforcement in the same manner as though all the provisions of this Act were still in force with respect thereto."

Thus, by the Acts referred to, namely, Acts 33, 147 and 164, we have a complete and harmonious statutory scheme covering the entire period from and including the year 1908 to and including the year 1915. And, obviously, just as Act 33, as amended by Act 147, contemplated six taxation periods, namely, 1908, 1909, 1910, 1911, 1912 and 1913, of which 1908 was the first of such periods, so likewise Act 164 contemplates four taxation periods, namely, 1912, 1913, 1914 and 1915, of which 1912 is the first of such periods.

The intention of the legislature, we think, is obvious. That the year 1912 was the first taxation period under Act 164, we think is clear. The language used is plain and free from ambiguity. And "when the terms of a statute are plain, unambiguous and explicit, the courts are not at liberty to go outside of the language to search for a meaning which it does not reasonably bear." *Suth. Stat. Const.*, §321. "Where the meaning of the language used is plain, it must be given effect by the courts, or they would be assuming legislative authority." 36 *Cyc.* 1107. "It is a very well-settled rule that so long as the language used is unambiguous, a departure from its natural

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meaning is not justified by any consideration of its consequences, or of public policy; and it is the plain duty of the court to give it force and effect." *Id.*, 1115.

The legislature by Act 164, in direct, positive and unequivocal terms said that the statute shall "relate retrospectively to give full effect to the provisions herein contained with respect to taxes for the first taxation period hereunder." One of the "provisions" of the statute is, that the rate of taxation on incomes derived during the "first taxation period" thereunder, 1912, was fixed at one per cent., and in order to "give full effect" to this, as well as to other "provisions" of the statute, the legislature, in unmistakable terms, expressly gave the statute retrospective operation. Such being the legislative command we have no alternative other than to give the language used "full effect" as directed. The expression, "the first taxation period hereunder," necessarily means the year immediately preceding the first day of January of the year in which the tax is payable, which, under Act 164, was the year 1912. And, inasmuch as the statute has fixed the rate of taxation on incomes derived during the taxation period of 1912 at one per cent., and the act having been expressly made retrospective with "respect to taxes for the first taxation period" thereunder, it follows, necessarily, that the assessor was not entitled to collect and receive taxes from the Apokaa Sugar Company on income for 1912 in excess of the rate of one per cent.

Neither the rule nor the authorities cited in support thereof, that statutes are to be construed as having only a prospective and not a retrospective operation, can have any application to the statute before us, for the reason that the legislature has expressly made it retrospective, and the language used being plain and unambiguous there is no room for construction. 36 Cyc. 1205-1208. If, however, the statute were open to construction, it being a revenue law, it should be construed strictly against the governmental authority. *Cooley, Taxation*, pp. 197-200; *Castle & Cooke v. Luce*, 5 Haw. 321, 324; *Suth. Stat. Const.*, §364.

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"It is the general rule that statutes providing for taxation are to be construed strictly as against the state and in favor of the taxpayers, and the burdens and liabilities which they impose are to be kept within the strict letter of the law, and not extended beyond its clear terms by any inference, implication, or analogy." 37 Cyc. 768. On the other hand, viewing the statute as removing a burden from the taxpayer by reducing the rate of taxation from two per cent. to one per cent., it should, if we were obliged to resort to construction, be liberally construed in favor of the taxpayer. *Suth. Stat. Const.*, §441.

There can be no question as to the power of the legislature to release or remit the Territory's claim for taxes. 37 Cyc. 1170, 1171.

The parties having stipulated that the court may enter judgment according as it may find the law, we therefore conclude that the Apokaa Sugar Company is entitled to judgment against Charles T. Wilder, Tax Assessor, First Taxation Division, Territory of Hawaii, for the sum of \$82.65. Judgment will be entered accordingly.

D. L. Withington (*Castle & Withington* on the brief) for Apokaa Sugar Company.

Wade Warren Thayer, Attorney General, for the assessor.

A. A. Wilder amicus curiae.

DISSENTING OPINION OF PERRY, J.

Act '33 of the Laws of 1909, approved by the governor on March 22 of that year, provided, for the first time in the history of Hawaii, for the imposition of a special tax on incomes, ever since known as the conservation tax, to be used, three-fourths for the encouragement of immigration and one-fourth for the development, conservation, improvement and utilization of the natural resources of the Territory. The first and second sections directed that, in addition to the tax of two per cent.

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authorized by an earlier statute to be levied and collected upon incomes for the general purposes of the government, there should be levied and collected annually upon the net income above \$4,000 received by every person and corporation, with certain exceptions not material in this case, a tax of two per cent. "on the amount so derived during the taxation periods defined by this Act." The third section declared that "the taxation period within the meaning of this Act shall be the year immediately preceding the first day of January of each year in which such tax is payable. Provided, that the first taxation period under this Act shall be the year immediately preceding the first day of January, 1909" and further provided that "the rate of taxation upon incomes derived during said first taxation period shall be one per cent. * * * and the amount of such tax shall be assessed forthwith and be payable in full on or before the fifteenth day of November, 1909." Section 4 expressly made all the provisions of sections 1280 to 1289, both inclusive, of the Revised Laws applicable to Act 33 in so far as the same were consistent with the later act. Section 5 specified the purposes to which the taxes collected should be applied and section 6 read as follows: "This Act shall be in effect from the date of its approval, and relate retrospectively to give full effect to the provisions herein contained with respect to taxes for the first taxation period hereunder; and shall continue in force to and until the thirty-first day of December, 1911; provided, that all taxes assessed under the provisions of this Act which shall remain unpaid at the end of said period shall be subject to collection and enforcement in the same manner as though all the provisions of this Act were still in force with respect thereto."

In 1911 section 6 was amended by striking out the figures "1911" and substituting the figures "1913," but in no other respect. By Act 164 of the Laws of 1913, approved April 30 of that year, sections 1 and 2 of the act of 1909 were amended by making the rate of the conservation tax one per cent. instead of two per cent., section 5 so as to provide that one-half of the

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proceeds should be used for the encouragement of immigration, one-fourth for the expenses of the board of commissioners of agriculture and forestry and one-fourth for the development, conservation, improvement and utilization of the natural resources of the Territory and section 6 by substituting the figures "1915" in place of the figures "1913." Act 164 contains no reference to sections 3 and 4 of the original act.

The question now submitted to this court for decision is whether the rate required by law for the conservation tax payable by plaintiff in 1913 upon its income for the year 1912 is one per cent. or two per cent.

It is an established rule of construction that statutes are to be construed as having only a prospective operation unless the intention of the legislature to give them a retrospective effect is expressly declared or is necessarily implied from the language used. In every case of doubt, the doubt must be solved against the retrospective effect. 36 Cyc. 1205. "It is a principle which has always been held sacred in the United States, that laws by which human action is to be regulated, look forwards, not backwards; and are never to be construed retrospectively, unless the language of the act shall render such construction indispensable." *Reynolds v. M'Arthur*, 2 Pet. 417, 434. "We are to remember there is a presumption against retrospective operation, and we have said that words in a statute ought not to have such operation 'unless they are so clear, strong, and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied.'" *United States v. American Sugar Co.*, 202 U. S. 563, 577. As well settled is the rule that "where a statute is expressly or by clear implication made retrospective to a certain extent or for a certain purpose, the courts will not by construction give to it a retrospective operation to any greater extent or for any other purpose." 36 Cyc. 1209. See also *Gumpper v. Waterbury Traction Co.*, 68 Conn. 424, 427. It is entirely clear that under the law as it stood until April 30, 1913, the

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date of the approval of the amendatory act, the rate of the conservation tax upon incomes derived during the year 1912 was two per cent. The machinery of the law for the return, assessment and collection of that tax was set in operation beginning with January 1, 1913. Returns were made during January, assessments were made prior to April 1, notices of changes by the assessor in the amounts of the taxable income were mailed to the taxpayers affected prior to April 1 and the time for the taking of appeals commenced to run before April 30 although it did not end until May 15. As early as February 1, 1913, the taxes at the rate of two per cent., on the income for 1912, became a fixed liability of the taxpayers to the government and their collection was at that date enforceable by action of assumpsit. *Keola v. Maui Auto Co.*, 20 Haw. 575. Possibly some of these taxes were paid, with or without suit, before April 30, 1913. An act passed on the date last mentioned should not be held to apply to taxes which had been already returned and assessed and which had become a fixed liability on February 1, unless its language is such as to require that construction. Act 164 of 1913 is by its terms to "take effect upon its approval." Section 4, however, provides for the amendment of section 6 of Act 33 (L. 1909) in the manner above stated, retaining all of the language of the original section save as to the change in the date fixed for the expiration of the act. The provision that the original act as amended "shall * * * relate retrospectively to give full effect to the provisions herein contained with respect to taxes for the first taxation period hereunder," is claimed by plaintiff to indicate that it was the will of the legislature that the new rate should apply to the taxes payable in 1913 on incomes for 1912. In the absence of the provision just quoted no doubt could be entertained that the new rate would not become effective until 1914. The act, both in its original and in its amended form, expressly makes all of the procedure prescribed by §§1280 to 1289, both inclusive, of the Revised Laws, relating to returns, assessments and collections applica-

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ble to the conservation tax. Under that procedure returns are made in January of each year and assessments are made and other steps taken in the months following. Unless otherwise provided, therefore, taxpayers' returns for the purposes of the amended act could not be made or required before January, 1914, and the new rate would not go into effect until the same time. The retrospective effect mentioned in section 6 of the amended act is given merely "to the provisions herein contained with respect to taxes *for the first taxation period hereunder*" and "the first taxation period hereunder" is clearly defined by section 3, which has remained unchanged from the passage of the original act, as follows: "Provided, that the first taxation period under this act shall be the year immediately preceding the first day of January, 1909." To define the phrase as referring to the year 1912 seems to me to be a view without support, direct or indirect, in the language of the act and in direct contravention of the legislative definition just quoted.

No provision was made in the amendatory act or in any other statute for the re-imbursement of any sums paid for taxes (in 1913 on incomes for 1912) under the original conservation act at the rate of two per cent. or of sums deposited for costs of appeals in 1913 upon the theory that the tax rate was two per cent. and which, if the amendatory act had not been passed, would have been forfeitable to the Territory under certain circumstances. R. L., §§1246, 1253.

The provision of section 6 relating to retrospective operation was inserted in the original act because there was no pre-existing law relating to a conservation tax and because without such an express declaration the tax would not be assessable until January, 1910, and upon incomes for 1909. The act as originally passed was consistent throughout in the respect under consideration. It provided prospectively for a rate of two per cent. upon incomes for 1909 and subsequent years and retrospectively for a rate of one per cent. upon incomes for 1908. That provision served its full purpose in 1909 and ever since has been and now

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is inapplicable to subsequent incomes. It may be that its presence in the amended act can be accounted for on the theory that it was still desired that the provisions of the original act should continue to operate with reference to the disposition of any unexpended balance of taxes collected upon incomes for 1908; but if it cannot it is simply one more of those instances known to history of inapt or inexact language used by human legislators in attempts to engraft new provisions upon prior statutes. In amending section 6 the sole object of the legislature would seem to have been to extend the operation of the act for an additional term of two years. Similar action was taken in 1911 when by Act 146 the life of the act was extended from December 31, 1911, to December 31, 1913, the only change in the section being the substitution of the figures "1913" for "1911." The continued use in the act of 1911 of the retrospective clause was of as little significance then as is its continued use now in the act of 1913.

Whatever difficulties of construction might have arisen if the act as amended had been enacted for the first time on April 30, 1913, I am satisfied, in view of the history of the legislation on the subject, that the intention of the legislature, sufficiently expressed in the statutes, was that the rate of the tax upon incomes for 1912 should be two per cent. and that the rate for the remainder of the term of the act should be one per cent.

In my opinion judgment should be entered for the defendant.

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MICHAEL BRAHAM *v.* HONOLULU AMUSEMENT
COMPANY, LIMITED, A CORPORATION.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED MAY 27, 1913.

DECIDED JUNE 4, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

ASSUMPSIT, Action of—definition—breach of contract.

A declaration for the recovery of damages for the non-performance of a parol contract to give plaintiff employment for a stated time at a specified compensation states a cause of action in *assumpsit*.

COSTS—assumpsit—attorney's commissions.

In such a case attorney's commissions are, under R. L., §1892, taxable as costs in favor of the prevailing party.

OPINION OF THE COURT BY PERRY, J.

This is an action instituted in the district court of Honolulu for the recovery of \$150. Upon the rendition, in the circuit court on appeal, of judgment in its favor the defendant sought to have allowed as a part of its bill of costs the amount of the attorney's commissions authorized by R. L., §1892, to be taxed "in all actions of *assumpsit*." The item was disallowed. The only question presented by the exceptions is whether this is an action of *assumpsit*.

The material allegations of the declaration are as follows: "That heretofore and on to wit, the 12th day of October, 1911, plaintiff and defendant entered into a certain written contract wherein and whereby it was covenanted and agreed that in consideration that plaintiff would perform as comedian with his dog at any of the theatres of the Honolulu Amusement Co., Ltd., at Honolulu, City and County of Honolulu, Territory aforesaid, for the term of three (3) successive weeks beginning with the 16th day of October, 1911, said defendant promised to pay said plaintiff as compensation for his services during said engage-

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ment of three (3) weeks the sum of \$150.00 per week; that plaintiff has faithfully observed and performed all conditions in and by said contract on his part to be observed and performed and ever has been and now is ready them to perform; that said defendant on to wit, the 30th day of October, 1911, without cause or excuse, did discharge said plaintiff from its employment and did refuse to carry out the terms of the said contract on its part to be carried out; that plaintiff did then and thereafter and since his discharge by defendant on to wit, the 30th day of October, 1911, as aforesaid, seek employment elsewhere in said Honolulu where his services as comedian might be required, but was and is unable to secure such employment; that by reason of the premises plaintiff is and was without employment for the week beginning October 30th, 1911, to his damage in the sum of \$150.00."

If it were doubtful, in the light of these allegations, whether this was an action *ex delicto* or in assumpsit, the doubt would be resolved against the plaintiff, since he himself until the filing of the bill of costs evidently regarded it as being in assumpsit. *Whittenton Mfg. Co. v. Memphis Packet Co.*, 21 Fed. 896, 901.

In his prayer for judgment he asks for attorney's commissions, a prayer wholly inappropriate in any action other than assumpsit; and in argument on the subject of costs he contended, as certified by the trial court in the bill of exceptions allowed with plaintiff's approval, that this was "an action for damages for breach of contract." It is not necessary, however, to base the decision upon this ground. Assumpsit is an action for the recovery of damages for the non-performance of a parol contract. "It lies upon contracts, either express or implied by law, and gives the party damages in proportion to the loss he has sustained by the violation of the contract." 3 Am. & Eng. Ency. Law 164, 165. Although in its origin an action *ex delicto* and formerly classed among the actions on the case, it is now generally regarded as purely an action *ex contractu* and as a form of action distinct from case. 4 Cyc. 319-321; 2 Ency. Pl. &

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Pr. 988. In the case at bar the essence of plaintiff's action consists in the breach by defendant of the latter's contract to give plaintiff employment for a stated time at a specified compensation, resulting in damages to the plaintiff. It is apparent from the averments that defendant's promise was not only to pay the salary but also to furnish employment. The declaration contains no element of an action *ex delicto*. There is no allegation of negligence, fraud or malice or of any breach of any duty fixed by law independently of the will of the parties. The only breach relied on is of an express contract entered into by the defendant. If the allegations as to the contract and its breach were stricken out, no ground of action, whether *ex delicto* or otherwise, would remain. See 38 Cyc. 426, 427. The action is in assumpsit and the attorney's commissions should have been allowed. The exceptions are sustained and the case is remanded to the circuit court for further proceedings not inconsistent with this opinion.

F. Schnack (*E. C. Peters* with him on the brief) for plaintiff.

A. S. Humphreys for defendant.

CITY MILL COMPANY, LIMITED, A CORPORATION,
v. T. HORITA, I. USUI, WALTER H. BRADLEY
AND WALTER BEAKBANE.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED MAY 27, 1913.

DECIDED JUNE 4, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

MECHANIC'S LIENS—notice of claim—description of property—requisites.

Under R. L., §2174, the description of the property against which a lien is sought must be such as to enable not only the

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owner but also prospective purchasers and creditors to identify the property.

IB.—misdescription of property—lien on part of structure.

In a notice of a material-man's lien the property was described as the building erected under a certain contract with the owner and "Lot 8, Block 103, Palolo Tract." The facts were that the building stood mainly on lot 10 and to a slight extent only on lot 8. Held, that, while courts are liberal in the construction of descriptions in notices of liens, the description in this case was precise and unambiguous and did not include lot 10 and that no lien attached to lot 10 because not included in the description or to lot 8 because the building stood substantially on lot 10 or to the building separately or any part thereof because not within the contemplation of the statute.

OPINION OF THE COURT BY PERRY, J.

This is an action to enforce a lien for \$457.58 for materials used in the construction of a dwelling house erected by defendants Usui and Horita in pursuance of a contract with defendant Bradley, owner of the land upon which the building was to be erected. Defendant Beakbane is alleged to have entered into a contract with Bradley while the building was under construction for the purchase of the building and the land whereon it stood. The circuit court rendered judgment against the contractors for the amount claimed and in favor of Bradley and Beakbane in relation to the lien. The only question presented upon plaintiff's exceptions is as to the sufficiency of the description of the property, against which the lien is claimed, in the notice of lien filed as required by law in the office of the clerk of the circuit court of the circuit in which the property is situated.

In the opening paragraph of the document so filed the plaintiff gives notice that he claims a lien "upon that certain piece or parcel of land situate at Palolo Valley, Honolulu aforesaid, known as Lot 8, Block 103, Palolo Tract, on a map or diagram of said tract filed in the office of the Registrar of Conveyances at Honolulu in Liber 252 on pages 327-330, together with the

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buildings, improvements and appurtenances thereon, for the sum of \$457.58 for materials furnished by the claimant above named at the special instance and request of I. Usui, sub-contractor above named, said materials to be used in the construction of a certain one-story building built and constructed upon said premises." Then follows a statement of the substance of the contract between the contractors and Bradley and the allegation that the contractors purchased from plaintiff certain materials which were subsequently used in the construction of the building mentioned and that the building was completed September 29, 1911; that on September 17, 1911, defendant Bradley "entered into a certain written agreement of sale with one Walter Beakbane, one of the owners above named, wherein and whereby said Walter H. Bradley did agree to convey to the said Walter Beakbane the premises hereinbefore mentioned and described, together with the building thereon constructed with the materials furnished by the claimant herein as aforesaid, for and upon the full payment by the said Walter Beakbane of a certain consideration to claimant unknown, and the said Walter Beakbane has not fully paid to the said Walter H. Bradley the full consideration or purchase price in said agreement named, nor has the said Walter H. Bradley, conveyed the same premises to the said Walter Beakbane." The concluding paragraph of the notice is as follows: "Wherefore, by reason of the premises and under and by virtue of the laws of the Territory of Hawaii, the claimant herein claims a lien for the sum of \$457.58 upon the building or structure aforesaid, and also upon said Lot 8, Block 103, Palolo Tract, Honolulu aforesaid, and all the right, title and interest, reversion, claim and or demand of the said Walter H. Bradley and Walter Beakbane, owners aforesaid, therein." This notice was filed on November 3, 1911. An amended description contained in plaintiff's amended declaration filed October 30, 1912, is not here considered, in view of the statutory provision that "the lien shall continue for forty-five days, and no longer, after the completion of the construc-

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tion or repair of the building, structure, railroad or other undertaking against which it shall have been filed, unless the same shall have been satisfied, or proceedings commenced to collect the amount due thereon by enforcing the same." R. L., §2174, as amended by Act 97, L. 1909. Defects in the notice cannot be cured by amendments made after the expiration of the period named in the statute.

Undisputed evidence adduced at the trial disclosed the following facts; that prior to the execution of the contract for the erection of the building Bradley, being the owner of the two adjoining lots numbered respectively 8 and 10 in Palolo tract, Honolulu, and each lot having a frontage of 75 feet on the street and a depth of 200 feet, sold to one Fieldgrove an L-shaped piece of land including the portion of lot 8, with a frontage of 50 feet, not adjoining lot 10 and the rear portion of lot 10 and of the remainder of lot 8,—thus reserving to himself the front portion of lot 10 and of the adjoining 25 foot strip of lot 8, a total frontage of 100 feet. Around the portion so reserved by Bradley a fence was erected and it was upon this reserved portion that the building contracted for was constructed. The structure was 36 feet square and stood in part upon lot 10 and in part upon lot 8, the part upon lot 8 being about 9 feet in width. Upon Fieldgrove's portion of lot 8 stood at the date of the filing of the notice another one-story frame building.

The modern tendency is undoubtedly towards a liberal enforcement of laws giving mechanics and material-men a lien upon property made valuable by their labor and material and therefore towards a liberal construction of descriptions, in the notices of lien, of the property against which the lien is sought. Technical accuracy of description is not required. Looseness of description is condoned, often on the theory that the statutes contemplate that the claimants will prepare their own papers. It has been said that "if there appear enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty to the

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exclusion of others, it will be sufficient" (Phillips, Mech. Liens, §379); that "only such mistakes as are calculated to mislead subsequent purchasers or creditors should destroy the claim" (Ib., §383); that "if by rejecting what is a false description enough remains to identify the property attempted to be described the description is sufficient under the statute" (*McHugh v. Slack*, 11 Wash. 370); and that "the essential thing is that it be described so that it can be identified" (*Pavement Co. v. Norwegian Seminary*, 43 Minn. 452). In the application of these principles, however, the courts appear not to be always in accord. Each case is to be determined in view of its own facts; but much likewise depends upon the particular provisions of the statute in the jurisdiction in which the case arises. Statutes differ greatly in different jurisdictions. As a general rule they do not require that the notice should describe the land. 27 Cyc. 122. In Missouri, for example, it is sufficient if the notice identifies the building or other improvement. Ib., n. 55; and *Sawyer v. Clark*, 172 Mo. 588, 595. Some statutes permit a lien upon the building alone, as well as upon the land and building. See, for example, *Kezartee v. Marks*, 15 Oregon 529, 536, and *Hannah & Lay Co. v. Mosser*, 105 Mich. 18, 31. Obviously in those cases in which the lien may attach to the building alone and in which misdescription, therefore, of the land is immaterial provided there is a sufficient description of the improvement, the test of the sufficiency of the description may differ very greatly from that which would be applicable if the lien could be enforced only against the land and the building jointly. Because of these distinctions and the differences in the facts adjudicated cases cannot be of much assistance in the determination of the case at bar.

Under our statute (R. L. §2173) a lien cannot exist or be enforced against any of the structures there named separately from the interest of its owner in the land upon which it is situated (*Emmeluth v. Au In Kwai*, 20 Haw. 180) and the notice must contain a description of the property "sufficient to iden-

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tify the same" (R. L., §2174, as amended by Act 97, L. 1909). The question in the case at bar is, therefore, as to the sufficiency of the description of the land and the building and not of the building alone. In view of the provision that the notice shall be filed in the office of the clerk of the circuit court, it was evidently the intent of the legislature that the description should be such as to enable not only the owner but also prospective purchasers and creditors to identify the property.

The description contained in the notice filed by plaintiff is upon its face unambiguous. It relates to lot 8 exclusively. The building erected by the contractors is clearly stated to be situated on the "said premises" and on the "premises hereinbefore mentioned," meaning lot 8 and none other; and there was a building on lot 8 of the same general nature as that described. Any intending purchaser searching for notices of liens on lot 10 would find no warning in this document of a claim against lot 10, or against any building on that lot. The claim is clear and precise that the land sought to be charged is "Lot 8, Block 103, Palolo Tract" as shown on a map filed in "Liber 252 on pages 327-330" in the office of the registrar of conveyances. The reference to the unrecorded agreement of sale and purchase, between Bradley and Beakbane, of "the premises hereinbefore mentioned and described" and of "the building thereon constructed" by the contractors, is insufficient to show that a lien was claimed against lot 10 on which the building was so constructed, particularly in view of the fact that the claimant in the concluding paragraph summarizes his claim as being against "the building or structure aforesaid and * * * said Lot 8, Block 103, Palolo Tract." The enclosed lot upon which the house was built is not mentioned in the instrument. Neither in the last paragraph nor elsewhere in the notice is a lien claimed, following the provision of the statute, in the land on which the building is situate. Had there been a general claim to that effect, perhaps the notice could have been construed to include a claim against lot 10. The claimant having clearly designated

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lot 8 as the land against which he sought a lien, his claim cannot be extended by construction to include lot 10.

A lien does not exist in plaintiff's favor against lot 8 because the building is substantially upon lot 10 and only to a slight extent upon lot 8. The statute grants a lien only against the land "upon which the same" (the structure) "is situated." So, too, the lien is given only "upon such building" as a whole. The statute does not contemplate a lien upon a part of the building or the severance, upon execution, of a part from the remainder.

The exceptions are overruled.

F. Schnack for plaintiff.

J. W. Russell (*Thompson, Wilder, Watson & Lymer* on the brief) for defendants.

ADALINA MONIZI, INDIVIDUALLY AND AS EXECUTRIX UNDER THE WILL OF JACINTHO P. FELINA, DECEASED, *v.* SOCIEDADE PORTUGUEZA DE SANTO ANTONIO BENEFICENTE DE HAWAII, A CORPORATION.

SUBMISSION UPON AGREED STATEMENT OF FACTS.

ARGUED MAY 27, 1913.

DECIDED JUNE 5, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

MUTUAL BENEFIT INSURANCE—*designation of beneficiary—power of appointment.*

The mortuary benefit which becomes payable on the death of a member of a benefit society forms no part of his estate. The right of the member to designate a beneficiary under the contract of membership is a power of appointment which, generally speaking, may be exercised only in accordance with the terms of the contract.

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SAME—by-laws—designation by will—waiver.

Where the by-laws of a benefit society prescribe a form to be used by members in designating beneficiaries of death benefits, and provide that "the society does not accept or recognize the validity of any provision or provisions made in any documents disposing of the benefit or part of the same except the declaration which has been duly made out in conformity with the by-laws," the designation of a beneficiary in a will filed with the society does not constitute a valid designation, and the mere receiving and filing of the will by the society will not operate as a waiver of the by-laws so as to estop the society from setting up the invalidity of the designation in an action brought against it to recover the amount of the benefit.

OPINION OF THE JUSTICES BY ROBERTSON, C.J.

This is a submission on agreed facts. One Jacintho P. Felina died on May 13, 1912, at South San Francisco, County of San Mateo, California, being at the time of his death a member in good standing of the defendant society, a mutual benefit society which is duly incorporated under the laws of Hawaii; the society maintained an agency in Oakland, California, through which the deceased, up to the time of his death, paid his dues and received sick benefits; upon the death of any member in good standing the society is required by the terms of its by-laws to pay a mortuary benefit to the person or persons designated by the member in a formal declaration filed with the society, or, in default of such declaration, the benefit to be paid to the widow, children, or other relatives of the member, and, in default of any such relatives, eighty per cent. of the benefit would revert to the society and the balance be used to defray the funeral expenses of the member; the amount of the benefit in this case was \$1700; the deceased executed a will on the 13th day of June 1911, which was forwarded to the society in the month of February 1912; and, after the testator's death the will was admitted to probate in California, the plaintiff being appointed as executrix; the will on being received by the society

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was filed but was not placed before the directors of the society, the custom being not to take up the consideration of such matters until after the death of the member; after the death of Felina his will was placed before the directors for their consideration; by this will the testator bequeathed to his cousin, the plaintiff herein, all his estate including all his "right, title and interest in and to life insurance and all other benefits in the 'Sociedade Portuguesa de Santa Antonio Beneficenti de Hawaii;'" the directors of the society held that the will was not a declaration which complied with the requirements of the by-laws and declined to allow the plaintiff's claim to said mortuary benefit.

The by-laws which have a bearing on the case, translated from the original Portuguese, are the following: Article 5 (Chap. 12) provides that the benefit "shall be paid to the person or persons whom the member has indicated by written declaration, to the supreme board; there existing no declaration disposing of the benefit the same shall be paid to" the widow, children, father or brothers of the member according to certain enumerated circumstances. Article 7 declares that the benefit shall not be considered as being of the estate of the member, and provides that "The society does not accept or recognize the validity of any provision or provisions made in any documents disposing of the benefit or part of the same, except the declaration which has been duly made out in conformity with the by-laws." And Article 21 provides that "When the member desires to make a declaration relative to the disposition of the benefit, he shall, at all time when practicable, require of the office of the society or of the agent of the district in which he resides, a form of the formality below indicated, and for which he shall pay 25 cents." Then follows a blank form designed to be signed by the member in the presence of witnesses, with spaces for the member's name, his membership number, names of the persons to whom he wishes the mortuary benefit to be paid, and the date of execution.

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It is not claimed that it was not practicable for the deceased to have obtained and used one of the blank forms which the society furnishes. The plaintiff contends that there was a substantial and sufficient compliance by the deceased member with the requirements of the by-laws relating to the designation of a beneficiary, and that she was so named as the beneficiary; and that if there was not such sufficient designation or declaration the society waived a compliance with its by-laws and is now estopped from refusing to recognize the will as a valid declaration.

The mortuary benefit which became payable on the death of the deceased member formed no part of his estate. The right of the member, based upon the contract of membership as evidenced by the by-laws, was to designate a beneficiary—a power of appointment. This is conceded by plaintiff's counsel. Generally speaking, the execution of such a power must be in compliance with the terms of the contract of membership, otherwise it will be invalid. 1 Bacon on Benefit Societies and Life Insurance (3d ed.) Sec. 239; *Eastman v. Association*, 62 N. H. 555; *Supreme Conclave v. Cappella*, 41 Fed. 1, 4; *Gray v. Sovereign Camp, etc.*, 106 S. W. (Tex.) 176, 179; *Police Relief Assn. v. Tierney*, 116 Mo. App. 447, 462, 470. In *Mellows v. Mellows*, 61 N. H. 137, it was held that a gift of a fund payable by a mutual benefit association contained in the will of a deceased member was not a compliance with a rule of the association which specified the beneficiaries “unless otherwise ordered in writing by the deceased member, such order to be signed by two witnesses and acknowledged before a justice of the peace.” See also *Mineola Tribe, etc., v. Lizer*, 117 Md. 136, 140. The by-laws may, of course, expressly authorize the designation of beneficiaries by will. *Estate of Alexandre*, 19 Haw. 551.

Members are presumed to know the by-laws and, if they are reasonable and legal, are bound by them. It is not con-

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tended that the by-laws of the defendant society are unreasonable or otherwise invalid. By-laws precluding the designation of beneficiaries of mortuary benefits by will have been recognized as valid and binding. *Thomas v. Covert*, 126 Wis. 593, 597. In that case it was well said of a provision against dispositions by will, "This is in effect an agreement by the certificate holder to forego the right to dispose of the proceeds of this contract by will and it precludes him from making disposition of them in this manner." The by-law of the defendant (Art. 7) which provides that the society does not accept or recognize as valid any disposition of a benefit contained in any document other than the declaration prescribed amounts to an express prohibition against the designation of beneficiaries by will, and destroys any force there might otherwise have been in the argument that Article 21 is to be regarded as merely directory and that the will in question, which specifically designates the plaintiff as the beneficiary of the fund, was a substantial compliance with its provisions, and, as such, constituted a valid declaration. A designation by will filed with the society, even if it might be regarded as a substantial compliance with Article 21, if that article stood alone, could not be accepted as such without violating Article 7. We conclude that as the deceased member made only an invalid designation, the plaintiff is not entitled to judgment unless it be on the second ground urged, i. e. that the defendant has waived a compliance with its by-laws and is estopped to ignore the designation made in the will.

That a mutual benefit society may voluntarily waive provisions contained in its by-laws where those provisions were designed for the benefit or protection of the society itself is well settled. *Splawn v. Chew*, 60 Tex. 532; *Manning v. A. O. U. W.*, 86 Ky. 136; *Kimball v. Lester*, 59 N. Y. S. 540; *Hall v. Allen*, 22 So. (Miss.) 4. The question now presented, however, is not whether the defendant intended voluntarily to waive the by-law for, clearly, it did not so intend, but whether

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it is bound by the alleged waiver operating as an estoppel. There is no doubt but that under some circumstances a waiver will amount to or operate as an estoppel, and, in insurance law, usually does so. The plaintiff cites *Kepler v. Supreme Lodge, etc.*, 45 Hun 274. The statement there made that "the retention of the will by said lodge without any objection to the form or manner of designation constitute a waiver of any defect or irregularity in such designation or disposition," was not necessary to the decision since the court held that the will did constitute a valid designation. The rules of the society impliedly permitted designations by will, and the circumstances otherwise differed from those of the case at bar. *Hellenberg v. I. O. B. B.*, 94 N. Y. 580, was also cited. It was there said (p. 586) that if the will had been presented to the lodge in the lifetime of the member "it would have been good as a designation although not yet operative as a will." But there, again, the rules were such as to permit the making of declarations by will if communicated to the lodge.

In the case at bar the alleged waiver arose out of the retention of the will by the society and the failure to notify Felina that it was not valid as a declaration under the by-laws. But the member was charged with knowledge of the by-laws and is presumed to have known that a will could not be accepted. Article 7 of the by-laws contains not a mere permission or direction, but is in words of negation and prohibition. The designation by will was not a mere informality but an attempt to designate a beneficiary in a prohibited manner. We think the failure to call the member's attention to the fact that wills were not recognized by the rules of the society did not amount to a representation that his will would be made an exception and would be acted upon. In the absence of such a representation, or silence under circumstances which would be equivalent to a representation, the basis for an estoppel is lacking. We hold

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that the defendant is not estopped to deny the validity of the declaration contained in the will.

Judgment for the defendant.

W. B. Lymer (*Thompson, Wilder, Watson & Lymer* on the brief) for plaintiff.

A. D. Larnach for defendant.

JAMES N. K. KEOLA, DEPUTY ASSESSOR AND COLLECTOR OF TAXES, WAILUKU DISTRICT, SECOND TAXATION DIVISION, v. SAMUEL PARKER, SR., A NON-RESIDENT.

ERROR TO DISTRICT MAGISTRATE OF WAILUKU.

ARGUED MAY 26, 1913.

DECIDED JUNE 7, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

LIMITATION OF ACTIONS—*action for taxes.*

The statute of limitations does not run against the Territory in an action to recover taxes.

OPINION OF THE COURT BY DE BOLT, J.

This is a writ of error to review a judgment entered by the district magistrate of Wailuku, county of Maui, in an action wherein James N. K. Keola (the defendant in error), as deputy assessor and collector of territorial taxes for the second taxation division of the Territory was plaintiff and Samuel Parker, Sr. (the plaintiff in error), was defendant. The action was brought October 29, 1912, by the deputy assessor and collector of taxes in his official capacity to recover of Parker the sum of \$146.85, being real property taxes assessed against him for the years 1900 and 1901.

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To the declaration filed by the plaintiff the defendant answered, denying all liability for the taxes claimed, pleaded the statute of limitations and also that the tax officials had been guilty of laches in not enforcing the statutory lien of the Territory, thereby precluding, upon equitable grounds, the right to enforce the claim against the defendant. The magistrate overruled the pleas interposed by the defendant and having heard the evidence gave judgment for the plaintiff for the sum of \$121.70.

Of the errors assigned the one chiefly relied upon is, that the claim is barred by the statute of limitations, the action not being "commenced within six years after the cause of such action accrued." R. L. Sec. 1791. Counsel for the plaintiff in error contends that the Territory is not a sovereign power, and, therefore, it is not exempt from the operation of the statute. On behalf of the Territory, however, it is contended that the ancient maxim "*nullum tempus occurrit regi*" applies, and that the Territory is within the application of the maxim.

"In the absence of express statutory provisions to the contrary, statutes of limitations do not as a general rule run against the sovereign or government, whether state or federal." 25 Cyc. 1006, 1007. This doctrine is founded upon the principle embodied in the ancient maxim, "*nullum tempus occurrit regi*," and in its modern application, according to the better rule, as we think, it is applied for the protection of all rights which are of a public nature and such as pertain purely to governmental affairs. Dillon on Municipal Corporations, 5th ed., §1192; 19 Am. & Eng. Ency. Law, 2d ed., 191; 25 Cyc. 1009; *Ralston v. Town of Weston*, 46 W. Va. 544, overruling *Wheeling v. Campbell*, 12 W. Va. 36; *Simplot v. Chicago, M. & St. P. Ry. Co.*, 16 Fed. 350, 360; *Cross v. Mayor of Morristown*, 18 N. J. E. 305, 311; *Supervisors of Logan County v. City of Lincoln*, 81 Ill. 156; *County of Piatt v. Goodell*, 97 Ill. 84, 90; *In re Counties v. County of Alturas*, 4 Idaho 145, 150; *The*

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People v. Town of Oran, 121 Ill. 650, 656; *Greenwood v. Town of La Salle*, 137 Ill. 225; *Russell v. City of Lincoln*, 200 Ill. 511, 522; *Mecartney v. The People*, 202 Ill. 51, 53; *Reed v. Mayor of City of Birmingham*, 9 So. 161, 164.

Judge Dillon, in volume 3, §1194, of his work above cited, says: "Municipal corporations, as we have seen, are regarded as having, in some respects, a double character,—one public, the other (by way of distinction) private. As respects property not held for public use, or upon public trusts, and as respects contracts and rights of a private nature, there is no reason why such corporations should not fall within limitation statutes, and be affected by them unless excluded from them. For example, in an action on contract or for tort, a municipal corporation may plead or have pleaded against it the statute of limitations. But such a corporation does not own and cannot alien public streets or places, and no mere laches on its part or on that of its officers can defeat the right of the public thereto. * * * The author cannot assent to the doctrine that, as respects public rights, municipal corporations are impliedly within ordinary limitation statutes. It is unsafe to recognize such a principle."

In an action brought for delinquent taxes in the State of Tennessee, the court, after quoting the rule as laid down by Judge Dillon, which we have quoted in part, says: "We think the rule eminently sound. The case before us comes strictly within it. All the citizens of the corporation are interested in its taxes and their prompt collection. They are presumed to be levied for the public good, and each citizen who receives the benefits should share the burdens of municipal governments; taxes are levied and collected for the public use and upon public trusts. It is not in the power of the corporation to relieve one and impose upon another a public burden, and no laches on its part or that of its officers can defeat the right of the public to have collected and rightfully appropriated, the

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public taxes. As against this right there is nothing of such a character that justice requires an estoppel or limitation should be asserted." *City of Memphis v. Looney*, 68 Tenn. 130, 136.

In *The City of Waterloo v. The Union Mill Co.*, 72 Ia. 437, 439, the court said: "The city is but an instrument for the exercise of the authority of the state, and its municipal powers in establishing and maintaining a street are exercised in the discharge of governmental functions. The statute of limitations, therefore, will not run to defeat the exercise of its governmental authority. In cases wherein arise questions involving property or contracts which do not pertain to the exercise of their authority, the statute will run."

As to the precise status of the Territory of Hawaii, we do not deem a solution of that question essential in this case. Suffice it to say that congress has declared "That the legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States locally applicable." Organic Act, §55. The power to authorize the assessment and collection of taxes is not only a rightful subject of legislation, but it is an indispensable power incident to all forms of civilized government. "Taxes are defined as being the enforced proportional contribution of persons and property, levied by the authority of the state for support of the government, and for all public needs. * * * The power of taxation is an incident of sovereignty, and is coextensive with that of which it is incident." *Cooley on Taxation*, 1, 3.

From whatever point we may view the status of the Territory as regards the rights of the public, whether as a mere municipality, or as an instrument for the exercise of the authority of the United States (*Coffield v. Territory*, 13 Haw. 478), the assessment and collection of taxes are of vital importance to the people of these islands. The rule, as well as the reason therefor, which a sovereign state may invoke to prevent the

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running of the statute of limitations, applies with equal force to this Territory. "The obligation of the citizen to pay his taxes is regarded as a continuing public duty which is discharged only by their payment." *Wasteney v. Schott*, 58 Ohio St. 410, 414.

In *Hagerman v. Territory*, 66 Pac. 526, the supreme court of New Mexico held in a tax case similar to the case at bar that the statute of limitations did not run against the Territory.

As to the claim that the tax officials had been guilty of laches in not enforcing the statutory lien of the Territory, we find no merit in the claim. "An exemption similar to that which the government enjoys from the operation of the statute of limitations exists in equity against the defense of laches and the laches of officers and agents will not be imputed to the government." 16 Cyc. 161.

We find no merit in the contention that the statute applies because the action was brought in the name of the assessor and collector of taxes. He acted in his official capacity and the action was obviously for the benefit of the Territory. Neither do we find any merit in the contention, that the statute applies because a portion of the money when collected will go to the county of Maui.

The case of the *Metropolitan Railroad Company v. District of Columbia*, 132 U. S. 1, is also relied upon by the plaintiff in error. We think the case is distinguishable from the case at bar. That was an action brought by the District of Columbia to recover from the Metropolitan Railroad Company the sum of \$161,622.52 for work done and materials furnished by the plaintiff in paving certain streets and avenues in the city of Washington, upon and in consequence of the neglect of the defendant to do the work and furnish the materials in accordance with its duty as prescribed in its charter.

With regard to the character of the case the court said: "It is an action on the case upon an implied assumpsit arising out

Keola v. Parker, 21 Haw. 597.

of the defendant's breach of a duty imposed by statute, and the required performance of that duty by the plaintiff in consequence. This raised an implied obligation on the part of the defendant to reimburse and pay to the plaintiff the moneys expended in that behalf. The action is founded on this implied obligation, and not on the statute, and is really an action of assumpsit. The fact that the duty which the defendant failed to perform was a statutory one, does not make the action one upon the statute. The action is clearly one of those described in the statute of limitations." It seems to us that the case falls within that class of cases which Judge Dillon characterizes as private. It was founded upon an implied contract and the obligation thereby created was a debt. "Taxes are not debts in the ordinary sense of that term." Cooley on Taxation, 13.

The Judgment of the district magistrate is affirmed.

Geo. A. Davis for plaintiff in error.

L. P. Scott, Deputy Attorney General, for defendant in error.

ELIZABETH G. GEHR v. ROBERT W. BRECKONS.

EXCEPTIONS FROM CIRCUIT COURT, THIRD CIRCUIT.

SUBMITTED JUNE 9, 1913.

DECIDED JUNE 16, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

PRINCIPAL AND AGENT—*implied authority—revenue stamps.*

An agent instructed to collect a sum named as the purchase price of certain leases, which the principal had agreed to transfer to the purchaser by a "good and sufficient deed of assignment," and to deliver the assignment, has implied authority to permit the purchaser to retain out of the agreed consideration the amount of the cost of the revenue stamps required by law to be affixed to the instrument.

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Id.—ratification of authorized act of agent.

A principal must disavow the unauthorized act of his agent within a reasonable time after the fact has come to his knowledge or he will be deemed to have ratified it.

Id.—burden of proof—presumption as to silence.

The burden of proving a ratification of the unauthorized act of an agent is upon the party relying upon it. There is no presumption, either of law or of fact, that a principal was silent when it was his duty to speak or that circumstances existed upon which a claim of ratification may be based.

Id.—breach of duty—burden of proving damage.

In an action on the case for breach of duty by an agent by paying, contrary to his instructions, claims presented against the principal, the burden is upon the plaintiff to prove the extent of his damage by showing that the claims were unfounded either in whole or in part or that facts existed which would have reasonably enabled plaintiff to make a favorable compromise of the claims.

COVENANTS—collection of rents—breach.

The collection of rents payable in advance under the terms of the leases, at the times prescribed in the leases and prior to the assignment, is not a breach of a covenant, in an assignment of the leases, that "no rents reserved * * * have been collected * * * except such rents as are now due and payable pursuant to the terms of the leases."

OPINION OF THE COURT BY PERRY, J.

This is an action on the case. The main allegations of the declaration are that defendant, an attorney at law, was employed by plaintiff (a) to receive on her behalf the sum of \$5500 which one Davies had agreed to pay her for an assignment of certain leases and rents, (b) to deliver to Davies the instrument of assignment, (c) out of the money collected to pay the Hilo Mercantile Company not exceeding \$60 and to retain as compensation for his services the sum of \$250 and (d) to forward the balance of \$5190 to plaintiff at Seattle in the State of Washington; that defendant, disregarding his duty to his client and "contriving and intending to injure, aggrieve, harass and oppress plaintiff" did not use due en-

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deavors to procure the sum of \$5500 from Davies but accepted \$5256 in place of \$5500 and delivered the assignment; that defendant paid the Hilo Mercantile Company \$315.49 in excess of the authorized amount of \$60 and without authority paid to one Dr. Cooper the sum of \$77 and for stamps on the writ of assignment the sum of \$24; and that by reason of the "malfeasance of said defendant and his failure to properly observe his retainer and employment, plaintiff has been damaged in the sum of \$677.91." At the trial the defendant offered no evidence. Aside from the testimony of plaintiff's attorney by way of identification of one of the letters about to be referred to, the only evidence introduced on the plaintiff's behalf consisted of the following five documents: An instrument dated December 9, 1907, whereby plaintiff agreed to assign to Davies, and the latter agreed to purchase from plaintiff, certain leases and rents for the sum of \$8000, \$2500 of which was to be paid on execution of the instrument and the balance of \$5500 on December 20, 1907; a copy of a letter from plaintiff to defendant, dated December 11, 1907; an acknowledgment by defendant, dated December 9, 1907, of the receipt of \$250 "on a/c of legal services, leaving balance due me * * * of the sum of \$250"; and two letters from defendant to plaintiff, one dated December 20, 1907, and the other February 7, 1908.

Plaintiff's letter to defendant read as follows: "Referring to the settlement made between me and T. Clive Davies concerning the Waiakea Mill Co. matter, in which you acted as my attorney, and under the terms of which settlement there is due me on the 20th day of December, 1907, the sum of \$5500.00, to be paid by Mr. Davies, I beg leave to advise you that I will not be in Honolulu at that time. I therefore authorize you to collect the money from Mr. Davies, retaining the balance of your fee,—that is, \$250.00—and the balance thereof, being \$5250.00 less the sum of somewhere between \$50.00 and

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\$60.00, which must be paid, under circumstances with which you are acquainted, to the Hilo Mercantile Company,—transmit to me through the medium of United States Money Orders at Seattle, State of Washington. In the meantime I deliver to you the deed necessary to perfect the settlement, which you are authorized to deliver when the \$5500.00 is paid and you are satisfied that the case of Hilo Mercantile Company -vs- myself, pending at Hilo, has been discontinued, and the two cases of the Waiakea Mill Co.,—one against myself and one against Mr. Charlock, have likewise been discontinued.”

Defendant's letters were as follows: “Today being the 20th. of December, the time fixed for the consummation of the agreement between you and Mr. Davies, I waited upon Mr. Holmes, but experienced some trouble. It was claimed by Mr. Davies that many of the rentals due under the leases had been paid in advance; that such payments in advance had not been in contemplation of yourself and him at the time the agreement was entered into; and that if we insisted upon the terms being literally complied with, they on their part would insist that the rent due from the Hilo Railway Company at the end of this year, should be taken by them. I saw some merit in their contention, and finally entered into an agreement with them that all rent should be figured as of January first, 1908,—they to pay us the Hilo Ry Co. rent, and we to give them allowance for such rent as had been paid in advance. The figures are now being made up, and I will write you on that matter by the next mail. Wishing to close up the matter immediately, however, (as I did not know what might happen in the meantime) I delivered the deed and took their check for \$5176.00, that representing the \$24.00 stamps due on the deed, and the \$300.00 difference on the Railway Company deal. As near as I can tell from a brief glance over the figures, we will probably have about \$150.00 more coming, or somewhere in that neighborhood anyway. I beg leave to hand you herewith forty (40) Money Orders, each in the sum of \$100.00, making in all the sum of \$4000.00, leaving in my hands the sum of \$1160.00. I have not figured out just where I come out at, but by Monday will get the entire thing straightened

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out, and forward whatever is due by the next mail. Out of this \$1160.00 I will have to straighten out the Hilo Mercantile Company claim, and my own fee. There is also a claim sent to me by Dr. Cooper for the sum of \$77.00, which he says you told him to come to me and collect. You will understand that I am paying no claims against you without your direct authority. Indeed, I am getting rid of the \$4000.00, so that if anybody else asks me I can say that I do not owe you anything. I know that my action on the rent matter will meet with your approval, since the deal was only fair and equitable, and that I know is what you wish to do."

"I beg leave to hand you herewith money order for the sum of \$539.96, settling accounts between us in full.

"They are made up as follows:—

Amount received from Davies & Co., December 20,	
1907	\$5176.00
Amount received from Davies & Co., December 23,	
1907	80.00
Total	\$5256.00
Amount paid Hilo Mer. Co. (as per letter, a copy of which is herewith enclosed)	\$ 375.49
Amount paid for Money Orders.....	12.00
Amount forwarded to you Dec. 20, 1907.	4000.00
Amount of fee	250.00
Amount retained for Dr. Cooper.....	77.00
Amount paid for Money Orders enclosed.	1.55 \$4716.04

Balance herewith enclosed\$ 539.96

I beg leave to hand you herewith statement of Davies & Co. relative to rents. If this be not correct, let me know and I will take it up with them."

Attached to defendant's letter of February 7, 1908, was a memorandum of the items making up the total of \$375.49 paid to the Hilo Mercantile Company; and also the statement referred to in the letter showing amounts "over-collected" and other amounts "under-collected" by plaintiff under the subleases mentioned in the agreement of December 9, 1907.

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While the evidence was meager, the plaintiff made a prima facie showing that defendant disregarded her instructions contained in the letter of employment, both by accepting from Davies less than \$5500 and by paying the \$77 to Dr. Cooper and the excess of \$315.49 to the Hilo Mercantile Company. The payment of the \$24 for stamps was within the authority by implication conferred on defendant by his principal. By the terms of the contract of December 9, 1907, plaintiff was required, in order to become entitled to the \$5500, to deliver to Davies a "good and sufficient deed of assignment" of the property described. Compliance with that agreement necessarily involved payment by plaintiff of the stamp duty. *Tomikawa v. Gama*, 14 Haw. 431. In purchasing the stamps, defendant merely performed plaintiff's undertaking—a prerequisite to the securing of the money which he was authorized and directed to collect.

On behalf of defendant it is contended that his unauthorized acts must be deemed to have been ratified by plaintiff since the evidence does not disclose that during the period intervening between the receipt by her of defendant's letter of February 7, 1908, and the commencement of this action on March 21, 1912, plaintiff wrote to defendant or disaffirmed his acts. It is undoubtedly the law that a principal must disavow the unauthorized act of his agent within a reasonable time after the fact has come to his knowledge or he will be deemed to have ratified it. *Clews v. Jamieson*, 182 U. S. 461, 483; *Rolling Mill v. Railroad*, 120 U. S. 256, 259; *Feild v. Farrington*, 77 U. S. 141, 148; *Gold-Mining Co. v. National Bank*, 96 U. S. 640, 644. If during the period mentioned the plaintiff did not reply to defendant's letters reporting his transactions as her agent, her silence would justify and perhaps require a finding of a ratification by her of his acts. But there is no presumption, either of law or of fact, that she was silent and no evidence was adduced tending to show that she was. The burden of proving

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a ratification in such a case is upon the party relying upon it. 31 Cyc. 1647; *Moore v. Ensley*, 20 So. (Ala.) 744, 749; *Combs v. Scott*, 12 Allen 493, 497; *Skirvin v. O'Brien*, 43 Tex. Civ. App. 1, 6. In view of the entire absence of evidence on the subject, this defense cannot now prevail.

No damage was shown to have been sustained by the plaintiff in consequence of the payments to Dr. Cooper and to the Hilo Mercantile Company. There was no evidence whatever tending to show that the amounts were not due and payable by plaintiff to the two claimants named, or that facts existed which would have reasonably enabled plaintiff to make a favorable compromise of the claims.

As to the remaining item of \$224 the only evidence is that to be found in defendant's letters and the memorandum attached to one of them and said by defendant to have been prepared on behalf of Davies. The memorandum contains a schedule of thirty-two leases, with the rental from each, all payable in advance, the dates when the rents were payable, to what date the rent under each lease was paid and the amounts under each claimed to be "over-collected" (a total of \$223.95) and those "under-collected" (a total of \$304.15). It is apparent upon the face of the statement that each of the amounts so claimed to have been "over-collected" was for a period, either annual or semi-annual, commencing in advance on a day prior to December 9, 1907, the date of the agreement to assign. None of these sums were collected prior to the times stipulated therefor in the leases. The agreement of December 9, 1907, contemplated the assignment of "the rents reserved by the said sub-leases and tenancies" (presumably the leases enumerated in the defendant's memorandum), but further provided that in the deed of assignment plaintiff should covenant "that no rents reserved by or under any sub-lease or sub-tenancy * * * have been collected by or on her behalf, except such rents as are now due and payable pursuant to the terms of the said sub-

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leases and tenancies." Upon the showing of defendant's own letter the rents charged to plaintiff in the settlement by Davies with defendant had not been "over-collected" and should have been credited to plaintiff.

As to the so-called "under-collected" rents no ruling is necessary at this time. If under the terms of the assignment they were the property of plaintiff, she was entitled to them in addition to the \$5500. If, on the other hand, the title to them passed to Davies, they remained uncollected by plaintiff and Davies was at liberty to collect them at any time and his obligation to pay plaintiff \$5500 was unaffected thereby.

The judgment below was for one dollar only, on the theory that no damage had been proven. The total collected by defendant from Davies was \$5280, including \$24 used for stamps. Since upon the only evidence in the case the plaintiff was entitled to recover at least the balance of \$220, the exceptions are sustained and a new trial is granted.

Eugene Murphy and *C. H. McBride* for plaintiff.

A. S. Humphreys for defendant.

ESTHER N. PILIPO AND ELIZABETH K. PILIPO v.
NETTIE L. SCOTT.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

ARGUED MAY 29, 1913.

DECIDED JUNE 19, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

LANDLORD AND TENANT—*eviction*.

To constitute an eviction it is not necessary that there should be an actual physical expulsion of the tenant from the premises. Any act of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises may be treated as an eviction. But, strict-

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ly speaking, there can be no eviction from premises of which the tenant never acquired the possession.

SAME—lease of undivided interest in land.

A lease of an undivided portion of the interest of a member of a Hawaiian land hui in a tract of land owned by the hui constitutes the lessee a tenant in common with the members of the hui of the whole tract. But the lessee is not relieved from the payment of rent on the ground of eviction by the lessor because of the lessee's inability to obtain possession of certain specific portions of the common land which prior to and at the time of the execution of the lease were in the exclusive occupation of the lessor or other members of the hui pursuant to a custom of the hui.

OPINION OF THE COURT BY ROBERTSON, C.J.

The plaintiffs (defendants-in-error) brought an action in the circuit court against the defendant to recover rent alleged to be due and unpaid under a lease of certain land situate on the Island of Hawaii. The venue was changed from the third to the first judicial circuit and the case was tried jury waived. The claim was for \$1113 for unpaid rent accruing during the period from March 1st, 1902, to September 1st, 1905. The defendant pleaded the general issue, and at the trial claimed an eviction on the part of the plaintiffs, which, it was contended, relieved her from the obligation to pay the rent. The circuit court found against the defendant's claim, and judgment was entered for the plaintiffs for the amount asked together with interest and costs aggregating the sum of \$2026.09. The plaintiff-in-error seeks to have that judgment reviewed.

It appears that the lands known as Holualoa 1 and 2, situate in the district of North Kona, Island of Hawaii, were purchased many years ago by a Hawaiian hui composed of about seventy-five members, the original number of shares being 400 which subsequently was reduced to 353 through the retirement by purchase or otherwise of 47 shares. At the time of the execution of the lease in question the plaintiff, Elizabeth K. Pilipo, owned 56 of the shares, subject to the dower interest

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therein of her mother, Esther N. Pilipo. The lands extend from the sea up into the mountain forests, comprising a total area of 7330 acres of which 6189 acres are situated above the upper government road. We understand it to have been admitted by counsel for the respective parties at the trial that the whole of the tract above the upper road had been leased by the hui prior to 1894. That part of the land therefore plays no part in this controversy.

The plaintiffs and the defendant executed an indenture dated August 21, 1894, whereby the former demised to the latter "fifty-three (53) shares out of their fifty-six (56) shares undivided of the land of Holualoa, in North Kona, Hawaii * * * but excepting and reserving therefrom to the lessors in the portion of the land makai of the upper government road, three (3) undivided shares of their fifty-six (56) shares, which said shares shall contain a house-lot near the sea adjoining the kuleana of H. N. Kahulu deceased; also the houses, pineapples and coffee planted by the lessors adjoining the new road running from Kailua mauka on both the upper and lower sides of said road; also other plants or trees planted by them; also the Koa and Ohia forest trees in the forest, excepting such as may of necessity be cut for the purposes of agriculture of the lessee. * * * * To have and to hold the said fifty-three (53) shares undivided * * * * for thirty years from and after the first day of September, A. D. 1894 * * *." The lessee covenanted, among other things, that "in entering upon the land makai of the upper government road not to enter or interfere with the parcels of the said land now occupied by members of the hui (hoa aina) either as house-lots or agricultural purposes in places heretofore planted by them," and "that if the said land of Holualoa shall be divided between the several share-holders during the term of this lease to exercise all reasonable diligence to secure for the lessors favorable locations for their said shares." And there was a covenant on the part of the lessors

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that "in case the land shall be divided during the existence of this lease then the said lessee shall have the sole power and authority to control the division of the shares hereby leased."

The members of the hui were tenants in common of the lands of Holualoa in proportion to their respective ownerships of shares, so-called, each share representing a $1/353$ interest in the land. Upon the execution of the lease, and by virtue of it, the lessee became a tenant in common of the lands of Holualoa with the members of the hui, including Miss Pilipo, in the proportion that the interest demised to her bore to the whole. We do not accept the view of counsel for the plaintiff-in-error that the lease demised to the lessee an undivided $53/353$ interest in the land clear and that all the exceptions mentioned in the lease were intended to be included in the three shares or interests which were not demised. We hold the proper construction of the language of the lease to be that the lessors demised $53/56$ of their interest in the common land but reserved and excepted therefrom the houses, pineapples and coffee planted by the lessors adjoining the Kailua road, meaning the land upon which the houses stood and upon which the pineapples and coffee trees were growing, also the other plants or trees mentioned, including the forest trees. The language purporting to except and reserve three shares in the land makai of the upper road which should include the house-lot near the sea was used loosely and inaccurately, for the three shares referred to were undivided interests in the whole land and were not included in the general description. An exception in a deed or lease withholds from its operation some part or parcel of the premises, which, but for the exception, would pass by the general description. A reservation is the creation of some new right issuing out of the thing granted, and which did not exist before as an independent right, in behalf of the grantor or lessor. The three shares were not included in the demise and no statement that they were excepted or reserved was necessary

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or appropriate. The language of the purported exception above referred to had no more effect than to designate the house-lot near the sea as being a portion of the premises which the lessors intended to occupy as against the lessee as a portion of their remaining interest in the premises. Neither party could rightfully claim, as against the other, the right to the exclusive possession of any part of the land (except the pieces expressly excepted in the lease the right to the possession of which as against the lessee the lessors retained) unless by virtue of some regulation or custom of the hui. The members of hui such as the hui of Holualoa usually agree upon by-laws or regulations to govern the use and occupancy of the common property. The rules of this hui, if it has any, were not in evidence though there was testimony tending to show that there was at least a custom among the members to recognize and respect individual occupancy in that part of the land which was adapted to agricultural use. What terms or conditions, if any, were imposed on such occupancy did not appear.

Soon after obtaining the Pilipo lease the defendant secured leases of individual interests from other members of the hui who had been cultivating portions of the agricultural belt, and acquired altogether 85 shares. The defendant then undertook to take possession of a portion of that belt containing an area of about 71 acres lying between the upper government road and the Kailua road, bounded on the north side by the J. C. Munn land (L. C. A. 3660) and on the south by the Scott trail, by erecting fences on such portions of the boundary of the tract as were not already fenced and by posting a notice at each of the four corners of the tract. This area contained coffee trees in bearing and was valuable on that account. The defendant proceeded to clear off the guava and other wild growth. An allotment of the agricultural belt separate from the rest of the common land lying above and below it would give to each hui share a little less than one acre. There was evidence tending to show

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that there were other portions of the common land both agricultural and non-agricultural which were available for use, but the husband of the defendant who acted as her business agent, testified at the trial that "what we were working for at that time was coffee land."

In order to constitute an eviction it is not necessary that there should be an actual physical expulsion of the tenant from the premises. Any act of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises may be treated as an eviction, that is, it must be something more than a mere trespass. *Holt v. Waialua Agl. Co.*, 18 Haw. 360. But, strictly speaking, there can be no eviction from premises of which the tenant never acquired the possession. 24 Cyc 1130, "An eviction consists in taking from the tenant some part of the demised premises of which he was in possession; not in refusing to put him in possession of something which, by the agreement, he ought to have enjoyed. A tenant cannot be evicted from that which he never possessed." *Etheridge v. Osborn*, 12 Wend. 529, 532.

The evidence showed that Miss Pilipo owned a kuleana (L. C. A. 7746:1) containing 4.7 acres situated within and near the center of the tract which the defendant intended to take up, and Mr. Scott testified that Miss Pilipo expressly requested the defendant to occupy the land about the kuleana because she wished that upon the making of the contemplated partition of the lands her proportion of the agricultural land should be located adjoining her kuleana, and that the defendant acceded to her request. Miss Pilipo admitted that she had entertained the desire attributed to her but she denied having made such request of the defendant. The circuit court found the fact against the defendant's contention.

We shall now refer to the four specific instances each of which is contended to have constituted an eviction of the defendant.

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During the coffee picking season of 1895 some Hawaiians claiming to act under the authorization of Mrs. Pilipo, against the objection of Mr. Scott, picked coffee from the trees growing on land of the hui between the māakai end of the kuleana and the Kailua road. Upon complaint being made to the plaintiffs they took the ground that the trees in question were growing on land which was included in their right of occupancy by reason of the ownership of their three undivided interests in the hui lands. There was testimony tending to show that those coffee trees had been planted by Miss Pilipo's father; that there was a small house on the place in which the plaintiffs were in the habit of living during the coffee picking season; that the plaintiffs were in possession exercising ownership there long prior to the date of the lease to the defendant and, personally or through tenants, have been ever since; and that this possession was acquiesced in by the members of the hui. Assuming that the acts done by the defendant in essaying to take possession of the 71-acre tract were authorized by a rule or custom of the hui and that they constituted an effective possession of all that area which was not occupied by others, it could not have had the effect of securing for her the possession of any portions of the tract then held by the plaintiffs or other members of the hui. The circuit court presumably took the view that the defendant had never obtained possession of the area in question, and hence that the continued possession of the plaintiffs was not an eviction of the lessee. We cannot disturb the finding, supported as it was by substantial evidence. Possibly the area here involved was covered by the exception made in the lease of "the houses, pineapples and coffee planted by the lessors adjoining the new road." The area seems not to have extended all the way down to the road though we find no other location mentioned in the testimony which would answer the description. But the point was not urged and we deem it unnecessary to consider it since the ground above indicated supports a conclusion which appears to be sound and sufficient.

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On April 22, 1895, Miss Pilipo leased to one Motonaga for the term of ten years her aforesaid kuleana and "all the coffee trees and berries thereof from and off my coffee trees now growing on a portion of the land on the makai side of my kuleana aforesaid, excepting the house-lot and the coffee trees thereon." There was evidence tending to show that the tenant took possession of the kuleana and some of the hui land immediately adjoining and nearly surrounding the kuleana, which, together with the area referred to in the discussion of the last point, covered four and three-fourths acres. Miss Pilipo testified that she claimed the right to make that lease also by reason of the ownership of her three undivided interests in the common land. There was evidence tending to show that the coffee trees growing there had been planted by Miss Pilipo and her father before her, and that the land was occupied by the lessors before and at the time of the execution of the lease to the defendant with the acquiescence of the members of the hui. This evidence went to show that the defendant never obtained possession of the area. The circuit judge personally viewed the *locus in quo*, and the court below in finding there was no eviction in this connection said, "A very large percentage of the coffee trees gave evidence of considerable age, and while the fence line in some instances exceeds the limit of the lands occupied by the old trees, it was by a few feet only and the zigzag lines followed very closely the outside limits of the old coffee clumps." The finding of the circuit court must be allowed to stand.

In 1890 Miss Pilipo went into possession of a small piece of land fronting on the upper government road and situated within the 71-acre tract referred to, upon which she built a house. This action of hers is claimed to have constituted an eviction. This point, like the two preceding, involved a question of fact which turned upon disputed testimony and which it was the province of the circuit court to determine. Miss

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Pilipo testified (and she was corroborated by other witnesses) that her father had previously cultivated taro there; that after his death and at the time the lease was made to the defendant, a member of the hui by the name of Kauhahao occupied the parcel and used it for the same purpose; that it had been fenced in; that upon her request Kauhahao yielded possession to her; that the defendant never had either actual or constructive possession of the place; that some of the lumber used in the construction of the house was bought from Mr. Scott; and that no objection was made by the defendant to her occupancy of the place. This evidence, if true, and the circuit court found it to be so, showed that no eviction of the defendant took place.

The remaining point is that an eviction occurred by reason of the plaintiffs having interposed certain objections in the suit to partition the land. The facts, briefly, are as follows: In September, 1897, the defendant and her husband commenced a suit in equity for the partition of the lands of Holualoa 1 and 2, naming the members of the hui as respondents; the plaintiffs herein filed an answer in which they admitted the matters alleged in the bill of complaint and joined in the prayer for a partition of the premises; commissioners were appointed and reports were made to the court; a tract of 5189 acres above the upper government road was sold and a partial distribution of the proceeds was made; it was proposed to divide a strip near the sea as well as the agricultural belt in kind among the owners of shares in the hui, and to sell the intervening section of kula land; much time was consumed in making surveys and maps and the matter was further complicated by reason of changes in the ownership of interests; on July 15, 1905, the commissioner sold the section last above mentioned in lots at public sale to various parties, and made application to the court for confirmation of the sales; this application was opposed on several grounds which were set forth in a paper filed on behalf of thirty-four members of the hui, among them being Mrs.

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Pilipo; Miss Pilipo's name does not appear as a party to the objection though she testified in this case that she was one of those who objected to the confirmation of the sales and that she had prompted others to make objection; she declared that she wanted the kula land divided in kind, and not sold; hearing upon the application and objection was postponed upon stipulation of counsel and no further action in the suit seems to have been taken. Counsel for the plaintiff-in-error contends that the "tying up the partition proceedings" by the defendants-in-error has prevented his client from obtaining the beneficial use of the premises to which the lease entitled her. Why the division of the agricultural land and beach property was not proceeded with has not been made clear. There is nothing in the record to suggest that it was due in any degree to any action of the defendants-in-error. We are unable to see any force in the claim that because the Pilipos preferred a division in kind of the kula land and joined in the objection to its sale the enjoyment of the use of the land by their lessee was obstructed or prevented. The act complained of constituted no eviction.

The non-payment of the rent having been conceded, and the only defense relied upon having failed of establishment, the plaintiffs were entitled to judgment for the sum claimed. The judgment is therefore affirmed.

J. W. Cathcart for plaintiff-in-error.

N. W. Aluli (*E. K. Aiu* with him on the brief) for defendants-in-error.

King v. Hawaiian Trust Co., Ltd., 21 Haw. 619.

MARIA K. KING v. HAWAIIAN TRUST COMPANY,
LIMITED.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED JUNE 13, 1913.

DECIDED JUNE 23, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

WILLS—indefinite devise.

An indefinite devise of land may be either for life or in fee according to the intention of the testator as gathered from the whole will.

SAME—gift of income, rents and profits of land.

It is a general rule that a gift of the income or the rents, issues and profits of land is to be construed *prima facie* as a gift of the property itself; but this, like all other rules of construction, yields to the intent of the testator.

SAME—will construed.

A testator devised and bequeathed his estate to a trustee in trust to control and manage the same and to pay the net income, rents and profits to T. J. C. during the term of his natural life, and after his death to "pay and deliver over the said net income, rents and profits to his daughters Lydia, Beatrice and Elizabeth, in equal parts if living, and if either of said daughters shall then be dead, the principal and property, the interest and income of which would otherwise be going to her, shall be paid directly to her lineal heirs, if any, and if none, the said interest and income shall be paid to the survivors equally, and upon the death thereafter of either of the survivors, my said trustee shall pay and deliver over the principal and property, the interest and income of which has theretofore been paid to her, to her lineal heirs if any, and if none such then exist, shall then pay and deliver the same to the collateral heirs of such one dead." Held, that the word "either" was used in the sense of "any;" that the word "thereafter" referred to the death of T. J. C. and meant the period following that event; the word "survivors" meant daughters surviving their father; and that the three daughters who survived their father were entitled to the income during their respective lifetimes only.

OPINION OF THE COURT BY ROBERTSON, C.J.

This is an action to quiet title to a piece of land (R. P. 148) situate on King Street in the city and county of Honolulu. The

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plaintiff claims to own an undivided one-third in the land in fee simple. The defendant claims the fee of the entire parcel as trustee under the will of Thomas Cummins, deceased.

The parties agreed upon the following facts: That the land described in the plaintiff's complaint was owned in fee simple by Thomas Cummins at the time of his death; that said Thomas Cummins died in the year 1885 leaving a will which was duly admitted to probate; that the land was devised by said will to Alexander J. Cartwright as trustee; that the defendant has succeeded to the trusteeship; that Thomas Jefferson Cummins, son of said Thomas Cummins, died on June 29, 1903; that on the date last mentioned the three daughters of said Thomas Jefferson Cummins named in said will were and still are living, the plaintiff herein being the one therein named as Beatrice; and that ever since the death of said Thomas Cummins the land in question has been in the possession and control of the trustee under the will.

The testator devised and bequeathed his property, real and personal, to the trustee directing him to control and manage the same and to keep the buildings on the real estate in good order and repair, and (first) to pay the net income, rents and profits thereof to his son Thomas Jefferson Cummins for his sole use and benefit during the term of his natural life, and (second) "After the death of my said son, the said Thomas Jefferson Cummins, shall pay and deliver over the said net income, rents and profits to his daughters Lydia, Beatrice and Elizabeth, in equal parts if living, and if either of said daughters shall then be dead, the principal and property, the interest and income of which would otherwise be going to her, shall be paid directly to her lineal heirs, if any, and if none, the said interest and income shall be paid to the survivors equally, and upon the death thereafter of either of the survivors, my said trustee shall pay and deliver over the principal and property, the interest and income of which has theretofore been paid to her, to her lineal heirs,

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if any, and if none such then exist, shall then pay and deliver the same to the collateral heirs of such one dead."

In the circuit court the defendant obtained judgment. The plaintiff brings exceptions.

This will was before the court in *Estate of Thomas Cummins*, 16 Haw. 185. The court there referred to one of the contentions advanced in that proceeding by the trustee as "a claim which would have great force if the appellants (daughters of Thomas Jefferson Cummins) were the remaindermen, and had come into possession of the estate upon the determination of the trust. But they are not so. They also are life beneficiaries of the income only." Counsel for the plaintiff claim that what was said was mere dicta; that the point was not argued or contested, but was assumed by court and counsel; and that the title to the real estate was not involved in that proceeding. On behalf of the defendant it is claimed that the ruling made in the former case was a binding decision upon the main question raised here. Whatever may be the proper view to take of the matter we prefer, under the circumstances, to rest our conclusion upon the construction of the will as we view it.

Basing her claim upon the rule that a devise of the income or the rents, issues and profits of land is *prima facie* a devise of the land itself, the plaintiff contends that as the three daughters of Thomas Jefferson Cummins survived their father the will gave them, on his death, the property in fee simple. The argument is that as the word "heirs" is not necessary to a devise of land in fee simple, and as the only contingency imposed by the will upon the payment of the income to the three daughters was that they should be living at the time of the death of their father the requirement was fulfilled by the event, and the remaining provisions of paragraph "second" of the will "dependent on contingencies which never happened are absolutely inapplicable and should not be considered."

It is true, as contended, that words of inheritance are not necessary in a will to carry the fee. But it does not follow that

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because a devise is not expressly for life that it must be in fee. An indefinite devise may be either for life or in fee according to the intention of the testator as gathered from the whole will. *Hemen v. Kamakaia*, 10 Haw. 547, 551; *Keanu v. Kaohi*, 14 Haw. 142.

It is also true that a gift of the income or the rents, issues and profits of property is to be construed *prima facie* as a gift of the property itself. *Hapai v. Brown*, ante, page 505. But this, like all other rules of construction, yields to the intent of the testator and will not be used to defeat his intention. We must take the will as a whole. In examining the second paragraph we cannot stop at the word "living" and say that it is enough that the language used up to that point is sufficient to carry the land to the daughters in fee. We must read further in order to ascertain what was intended by the indefinite devise, and whether the devise of the income was intended to be of the property itself. It is possible, but quite improbable, that it was the intention of the testator that if one of the daughters should happen to pre-decease her father without lineal heirs the surviving daughters should take only the income for life whereas if all the daughters should survive their father they would take the whole corpus of the estate. Such a plan would not readily be attributed to the testator as there is no apparent reason for his making the distinction suggested. A construction which fully and fairly accounts for every part of paragraph "second" and makes a consistent and reasonable scheme is to be preferred.

The word "either" is sometimes used in the sense of "any." 14 Cyc. 1232; *Lafoy v. Campbell*, 42 N. J. E. 34, 37; *People v. Willis*, 39 N. Y. S. 987, 989; *Chidester v. Railway Co.* 59 Ill. 87, 89. It was used in the sense of any of three in the second paragraph of this very will in the sentence "if either of said daughters shall then be dead." Where the word was used again in that paragraph we think it was used in the same sense. The word "thereafter" obviously refers to the death of the son, and means the period following that event. The word "survi-

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vors" was used twice and in each instance it meant daughters surviving their father. The mere fact of having survived one of the daughters would not entitle another daughter to take unless she, in turn, survived her father. In order for a daughter to take anything under the will she must have outlived her father. See in this connection, *Brimmer v. Sohler*, 1 Cush. 118, 129; *Taylor v. Stephens*, 72 N. E. (Ind.) 609, 613.

The second paragraph of the will was very concisely drawn, and every possible contingency was not expressly provided for, but we believe the testator's intention appears with reasonable clearness. Taking the paragraph in its entirety the following intent is evidenced; that upon the death of Thomas Jefferson Cummins, if any of the daughters shall have pre-deceased him, one-third of the corpus of the estate should go to the lineal heirs of the daughter, or, if more than one, to the lineal heirs of each of the daughters so deceased; that in case the daughter or daughters so dying should have left no lineal heirs the surviving daughter or daughters should receive the income for life; that in the event of all the daughters surviving their father they should share the income equally during their respective lifetimes, and upon the death of each daughter one-third of the corpus of the estate would go to her lineal heirs, if any, and otherwise to her collateral heirs. Omitting that part of the paragraph which refers to the contingency that did not happen, i. e., the death of a daughter in the lifetime of the father, and leaving out words which do not change the sense, the paragraph would read, "After the death of my said son * * * shall pay and deliver over the said net income * * * to his daughters * * * in equal parts * * * and upon the death thereafter of either of the survivors, my said trustee shall pay and deliver over the principal and property, the interest and income of which has theretofore been paid to her, to her lineal heirs, if any, and if none such then exist, shall then pay and deliver the same to the collateral heirs of such one dead." The same result is reached, therefore, whether the paragraph be read and construed

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as a whole, or whether the intermediate clause be eliminated.

The fact that the testator drew a clear distinction between "the income, rents and profits" on the one hand and "the principal and property" on the other, the former being payable to the daughters and the latter to their lineal or collateral heirs, shows that the gift of the former was not intended to be a gift of the corpus of the property. In this respect the will in hand differs materially from that considered in the case of *Brown v. Hapai*. The only direct gift to the daughters was in the direction to the trustee to pay them the net income of the property. And the devise of the principal of the estate to the heirs of the daughters shows conclusively that the gift of the income was intended to be for the terms of the lives only of the daughters.

The exceptions are overruled.

Thompson, Wilder, Watson & Lymer for plaintiff.

Prosser, Anderson & Marx and *S. E. Hannestad* for defendant.

LEIALOHA (k), LAHAPALIILII BUSH AND JOHN F.
COLBURN v. EDWARD H. F. WOLTER.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

ARGUED JUNE 17, 1913.

DECIDED JULY 1, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

ADVERSE POSSESSION—*continuity of*.

In order to perfect title by adverse possession, such possession must be continuous for the whole period prescribed by the statute of limitations. Any break or interruption of the continuity of the possession will be fatal to the claim of the party setting up title by adverse possession.

Id.—*break or interruption of continuity*.

Where, in an action of ejectment, the defendant relied upon the statute of limitations, and the evidence was, that the improvements on the premises were destroyed by fire; that the premises

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were then quarantined by the board of health; that during the quarantine the plaintiffs and the defendant were excluded from the premises; that from and after the removal of the quarantine the premises remained vacant, unenclosed and unused for a period of about two and one-half years, when the defendant resumed possession. Held, that the interval of two and one-half years which elapsed between the date of the removal of the quarantine and the date on which the defendant resumed possession of the premises constituted a break or interruption in the continuity of possession and was fatal to the defendant's claim of title by adverse possession.

EVIDENCE—burden of—adverse possession.

The burden of proving adverse possession on the part of the defendant rests upon him, and it is immaterial in the application of this rule whether the plaintiff has acquired title by deed or by prior adverse possession.

OPINION OF THE COURT BY DE BOLT, J.

This is a writ of error to the circuit court of the first circuit to review a judgment entered in an action of ejectment, wherein Leialoha, Lahapaliilii Bush and John F. Colburn (the defendants in error), were plaintiffs and Edward H. F. Wolter (the plaintiff in error), was defendant.

The plaintiffs Leialoha and Lahapaliilii Bush claim title to the premises in controversy in fee simple by inheritance from their ancestors and predecessors in title, who, it is claimed, acquired title by adverse possession, and the plaintiff Colburn claims the right to possession of the premises by demise from the other two plaintiffs. The plaintiffs adduced evidence tending to establish their claim of title. The defendant contends, however, that the evidence was insufficient to establish title in the plaintiffs and that in any event he was entitled to judgment for the reason that he had maintained complete, exclusive and adverse possession of the premises against the plaintiffs and their predecessors in title for the statutory period of ten years next preceding the commencement of the action of ejectment, which was begun on August 19, 1910.

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This is the second occasion on which this case has been before us. On the former occasion the case was brought up on a writ of error sued out by the plaintiffs (the present defendants in error) to review a judgment of nonsuit entered against them. That judgment was reversed and the cause remanded for a new trial. A new trial upon the merits was then had (jury waived), and judgment was entered for the plaintiffs for the recovery of the premises. To reverse this judgment the defendant (the present plaintiff in error) sued out the writ now before us for consideration.

The evidence adduced by the plaintiffs at the second trial was substantially the same as that adduced by them at the first trial, except as to probate record No. 1447, *re* estate of Kahoowaha, deceased, which the plaintiffs offered in evidence at the first trial for the purpose of showing that Kahoowaha died in or about the year 1862, intestate, leaving as an estate Apana 2, L. C. A. 30, R. P. 1809 (which includes the premises in controversy), and that on January 6, 1865, Umiumi, a brother, and Mauiawa, a nephew of the deceased, were decreed to be the heirs at law of Kahoowaha and that distribution was made to them accordingly, but the court, upon objection by the defendant, declined to receive the record in evidence. At the second trial, however, the court admitted the record in evidence, but confined it to the purpose of showing color of title in Umiumi and Mauiawa. The record also shows a quitclaim deed from Umiumi to Mauiawa bearing date January 23, 1865.

For a detailed statement of the facts of plaintiffs' side of the case, as disclosed by the record in the first trial, reference may be had to the opinion of this court heretofore rendered in this case. Ante 304.

The premises in controversy consist of an "L" shaped parcel of land extending along the Waikiki and mauka sides of a rectangular piece of land, the property of the defendant, which is near the business center of Honolulu. It appears that the defendant in 1897 or in 1898 erected a building on his land, which

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building covered the whole of his property. At the time his building was being erected the defendant claims that he took possession of the premises in controversy, enclosed them with a fence and used them in connection with his building. The plaintiffs dispute this and contend that their predecessors in title were in actual possession of the premises during this period.

As to this phase of the case, covering the period from 1897 to January 20, 1900, the trial court in its decision said: "From the year 1897 until the great fire of January, 1900, the evidence concerning the occupation of the land in dispute is contradictory. At least three of the witnesses for the plaintiff testify that the buildings occupied by Oili and Mauiawa remained on the land as designated by them until destroyed by fire. The defendant insists that when he erected a building on the saloon premises in 1898 he put up a fence around the boundaries of the land in dispute and that the fence and building remained until the fire of 1900, when they were destroyed, and his witnesses testify in support of this contention."

It appears that very soon after the great fire of 1900 the premises in question were fenced off—in effect quarantined—by the board of health, thereby excluding the plaintiffs and the defendant from actual possession.

The defendant claims that as soon as the quarantine was terminated and the fence, which the board of health had erected around the premises was removed by the authorities, he erected a temporary fence around the premises, thus enclosing the property as it was before the fire. In respect to the testimony of the defendant upon this aspect of the case the trial court in its decision said:

"There is much confusion in the testimony of the defendant concerning his action after the fire. He said that the board of health took possession of the entire lot by putting up a board fence; that 'Right after the fire I put the same kind of a building, in 1901. The fire was in 1900.' Immediately after the

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fence was taken down by the board of health he 'immediately went over the place again and put up a fence.' 'I had a fence put on the same line again as it is; as it was before and as it is now.' 'I should surmise it would be nine months, eight or nine months.' (After the fire). 'I put up the present building in 1901 and had the fence put up by a native at the same time.' Repeated questions as to when the temporary fence was erected with regard to the construction of the building failed to elicit any answer. Finally he said, 'It couldn't have been more than three weeks at the highest when I put up the temporary fence; when I threw all the lumber there, piled inside, got it inside, and after I got the building up I had a fence put the same as you see it there today.' The defendant fixed the period of the erection of the new building from November, 1901, to January, 1902; he also said that the temporary fence was put up about eight months after the fire. November, 1901, would be 22 months after the fire, and three weeks before the commencement of the building operation would place the erection of the temporary fence somewhere in October, 1901, if the testimony is correct as quoted above. It appears also that the defendant is in error as to the period during which the building was erected, as there is very strong evidence that the building was not completed until some time in the early part of the year 1903. * * * The condition of affairs from January, 1900, up to the erection of the building is not shown with any degree of certainty as to dates. The preponderance of the evidence seems to be against the defendant and points to a serious error on his part; namely, the time when the building was erected, which, in turn, fixes the other events. I am unable to say that the defendant has sustained the burden of showing a continuous, complete and adverse possession of the property in dispute for the statutory period."

Whether or not the period following the fire during which the premises were held in quarantine should be counted in favor of the defendant need not be decided. The evidence of the defendant was such that the court could have found from it that the quarantine was terminated about July, 1900; that the defendant did not resume possession of the premises until about the beginning of 1903; and that during that interval of about two and one-half years the premises were vacant, unenclosed

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and unused. So far as the evidence shows, there was nothing to prevent the plaintiffs from taking possession. There being no actual possession during the period mentioned, the constructive possession reverted to the true owners—the plaintiffs.

To establish his claim of title by adverse possession it was incumbent upon the defendant to show ten years of actual and continuous possession. The land in question is business property, near the center of business in the city of Honolulu, and is susceptible of definite control within exact boundaries, and the defendant, in order to maintain the adverse character of his possession, as soon as was reasonably practicable after the removal of the quarantine, should have entered upon the premises and reestablished actual possession thereof. The failure on the part of the defendant to show that he had maintained actual possession of the premises during the period referred to justified the conclusion that the continuity of possession following the removal of the quarantine had not been proven by him.

The errors assigned by the defendant are: "1. The court erred in rendering decision in favor of the plaintiffs against the defendant, and granting judgment in favor of the plaintiffs against the defendant; 2. The court erred in deciding that 'from the year 1897 until the great fire of January 1900, the evidence concerning the occupation of the land in dispute is contradictory;' 3. The court erred in deciding that 'there is much confusion in the testimony of the defendant concerning his action after the fire;' 4. The court erred in deciding that the 'erection of the fence was either in October 1902 or October 1900;' 5. The court erred in deciding that it did not appear how long the quarantine of the board of health continued; 6. The court erred in deciding that the defendant should have shown how long the quarantine of the board of health continued, and in refusing to take judicial notice of the existence of the quarantine; 7. The court erred in deciding that 'the preponderance of the evidence seems to be against the defendant;' 8. The court erred in its holding that the defendant must sustain the burden of showing

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a continuous, complete and adverse possession of the property in dispute for the statutory period."

Assignments 1, 2, 3, 4, 5, 6 and 7 may be disposed of without further comment.

Assignment 8, that "The court erred in its holding that defendant must sustain the burden of showing a continuous, complete and adverse possession of the property in dispute for the statutory period," is without merit. As to this question, counsel in their brief say: "At the outset this proposition must not be taken as disputing the general rule that the burden of proving an adverse possession is on the party alleging it, but it is insisted that the rule requiring the burden of the party alleging adverse possession has application only when such adverse possession is claimed against one having real ownership by deed title. And the defendant contends that where both plaintiff and defendant claim title through adverse possession, the general rule of the burden of proof applies, to-wit, that the burden of proving the cause of action rests with the plaintiff having the affirmative throughout the entire case."

Counsel cite no authority in support of their contention nor have we found any. The fact that the plaintiffs' predecessors in title acquired the premises in question by adverse possession, and not by deed, has nothing to do with the order or burden of proof, and in no way affects the validity of the title. The title is as perfect as if it had been conveyed by deed. "By adverse possession of land for the statutory period of limitation the adverse holder acquires a title in fee simple which is as perfect as a title by deed. Its legal effect is not only to bar the remedy of the owner of the paper title, but to divest his estate and vest it in the party holding adversely for the required period of time, so that he may maintain an action of ejectment for the recovery of the land even as against the holder of such paper title who has ousted him." 1 Am. & Eng. Ency. Law, 2d ed., 883, 886.

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We find no error in the record. The judgment of the circuit court, therefore, is affirmed.

J. W. Russell (Thompson, Wilder, Watson & Lymer with him on the brief) for plaintiff in error.

W. C. Achi and N. W. Aluli for defendants in error.

TERRITORY OF HAWAII *v.* MOKE MAKAIWI, KAHIKI, HIRONAGA, KAWANO, YAMAMOTO, KONJI, ISOMURA AND KAYANO.

APPEAL FROM DISTRICT MAGISTRATE OF WAILUKU.

SUBMITTED SEPTEMBER 4, 1913.

DECIDED SEPTEMBER 6, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

CONSTITUTIONAL LAW—*police power—public fisheries.*

Sections 94 and 95 of the Organic Act have not reserved to Congress exclusive control over the sea fisheries of this Territory. The police power of the Territory with reference to the public fisheries has not been restricted so as to prevent the enactment of general laws respecting the means or methods by which fish may be taken and forbidding the use of certain kinds of nets. Act 156 of the Session Laws of 1913 held not to be in conflict with said sections of the Organic Act.

OPINION OF THE COURT BY ROBERTSON, C.J.

The defendants have appealed upon points of law from a judgment of conviction entered against them in the district court of Wailuku, County of Maui, upon a charge of violating Act 156 of the Session Laws of 1913 by taking from the waters of the Territory certain fish known as Iao with a seine net over twelve feet in length. The defendants admitted the taking of the fish in the manner alleged and that the point at which they were caught is within a marine league from the shore.

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Act 156 of the Laws of 1913 makes "the taking or killing of fishes known as Nehu and Iao, by means of any draw, drag or seine net over twelve feet in length in the waters of the Territory" a misdemeanor. The defendants contend that the statute conflicts with sections 94 and 95 of the Organic Act and, therefore, is void.

The argument is that the organic provisions referred to which provide for an examination into and report upon the entire subject of fisheries in this Territory by the commissioner of fish and fisheries of the United States, with recommendations for legislation, and declare that all fisheries in the sea waters of the Territory not included in any fish pond or artificial inclosure shall be free to all citizens of the United States, subject to certain vested rights, have resulted in the reservation by Congress to itself of all control of the sea fisheries, and the withholding from the Territory of any right of restriction or regulation of the use of those fisheries. The same question, substantially, as is here presented has been considered by this court in previous cases wherein views adverse to that urged by counsel for the defendants have been expressed. Referring to sections 95 and 96 of the Organic Act the court said in *Territory v. Matsubara*, 19 Haw. 641, 643, "We do not infer from this legislation that Congress intended that the business of fishing for profit in the sea waters of the Territory should be free from police regulation or taken out of the taxing power of the Territory, the object of the provisions cited being to do away with the exclusive private rights of fishery in those waters," and in *Territory v. Hoy Chong*, ante, 39, 41, we said that "the declaration that the sea fisheries of the Territory shall be free to all citizens of the United States was not intended to curtail the right of the legislature to enact laws in the interest of the public for the protection and preservation of those fisheries." Those cases are not at all inconsistent with the case of *In re Fukunaga*, 16 Haw. 306, cited in the defendants' brief. The police power of the Territory with reference to the public fisheries has not

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been restricted by the provisions of section 95 of the Organic Act so as to prevent the enactment of general laws respecting the means or methods by which fish may be taken and forbidding the use of certain kinds of nets. That section must be read in connection with the grant of legislative power contained in the 55th section of that Act, under which is included, as a rightful subject of legislation, the police power. The legislature exerted that power in passing the statute in question.

The provisions of section 94 of the Organic Act would indicate an intention on the part of Congress to enact regulations with reference to the use of the fisheries of the Territory, but until such enactments shall have been made, at least, the power to prescribe general regulations may be exercised by the legislature of the Territory. We hold that Act 156 of the Laws of 1913 does not conflict with the Organic Act in the respect claimed by the defendants.

The judgment appealed from is affirmed.

L. P. Scott, Deputy Attorney General, for the Territory.

Andrews & Quarles and Eugene Murphy for defendants.

S. K. KAE0 v. S. OZAKI.

EXCEPTIONS FROM CIRCUIT COURT, FIFTH CIRCUIT.

ARGUED SEPTEMBER 2, 1913.

DECIDED SEPTEMBER 8, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

EVIDENCE—attested instruments—mode of proof.

In this jurisdiction it is not necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite. Such an instrument may be proved by admissions or otherwise as if there were no attesting witness thereto.

NAMES—variance—Anglicizing foreign names.

In pleading extreme strictness is not required in writing in English a Japanese name.

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EVIDENCE—*inconsistency with pleading.*

In assumpsit an answer admitting that the amount sued for is due to seven persons named renders untenable at the trial a claim that the debt is due to the seven persons and certain others as partners.

OPINION OF THE COURT BY PERRY, J.

This is an action of assumpsit for \$452.82 for money alleged to have been received in July, 1903, by defendant from the McBryde Sugar Company, Limited, a corporation, "belonging to and on account of wages due Sakutaro Hikiji, K. Matsuo, Miyadaki, Yamanaka, Yoneda, Ishida and Yamaguchi, for work performed," it being further alleged in the declaration that the seven Japanese named assigned the claim to the plaintiff. In his answer the defendant expressly admits that at the time named he was indebted to the seven Japanese named in the sum stated but denies that they at any time "legally assigned said claim to plaintiff or that plaintiff is the legal owner of said claim or any part thereof"; and sets up as a further defense a counterclaim for \$371.70 for goods furnished and money advanced to plaintiff's assignors. The trial court, jury having been waived, found for the plaintiff for the full amount claimed.

The court below found that the testimony given in support of defendant's counterclaim was not "entitled to any credence whatever" and this court is not asked to set aside the finding.

The written assignment introduced in evidence by the plaintiff was attested by a subscribing witness who, although within reach of a subpoena, was not called to testify; nor was proof offered of the signature of the subscribing witness. The appellant relies upon the ancient rule of the common law that the execution of an attested instrument must be established by the subscribing witness if he is available and competent to be examined or if he is not available or competent by proof of his signature; and that the necessity of calling the subscribing witness cannot be dispensed with by the admissions or other testimony of the

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parties to the instrument. 17 Cyc. 431; 2 Wigmore, Ev., Secs. 1287, 1288; *Bullions v. Loring Brothers*, 1 Haw. 372; *Brown v. Mendonca*, 12 Haw. 249. In this Territory, however, as in many other jurisdictions, that rule has been greatly modified by legislative enactment. Our statute prescribes that "it shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite; and such instrument may be proved by admissions or otherwise as if there had been no attesting witness thereto." R. L., Sec. 1960. This language is too clear to require construction. It applies, since attestation is not requisite to the validity of the assignment under consideration.

The execution of the assignment was sufficiently proved by other evidence. The plaintiff testified: "I am the plaintiff in this cause as assignee of certain parties therein named in the complaint. The claim was assigned to me by the parties named in the complaint in writing. * * * The assignment was made in English as well as in Japanese; both assignments made by the parties named were made in my office at Nawiliwili by Mr. Sheba" (the subscribing witness). The document being then translated by the Japanese interpreter at the request of the court, the plaintiff resumed: "All these signatures were made at my office and in my presence." There can be no doubt that in this testimony the plaintiff was referring to the original assignment written in Japanese, the only document then before the court, and to the signatures thereon of the seven Japanese named in the declaration. Hikiji, one of the assignors, testified that at the plaintiff's house Ishida, Yamanaka, Matsuo, Yamaguchi, two other co-laborers whose names he did not recall, and the witness had all signed a paper whereby they had transferred to the plaintiff their claim for the wages in question. Ishida, another of the assignors, testified that "because we did not receive any more money", referring to their wages, "everything came into trouble, so we came to Kaeo and sell it out." The evidence was sufficient to support the finding and conclusion of

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the trial judge that the execution of the assignment was proven.

The written translation offered in evidence shows two of the signatures to the assignment to have been by "Miyazaki Akitaro" and "Yamada Kinzo" while in this respect the allegation of the declaration was that the assignment was by "Miyadaki" and "Yamaguchi." Defendant contends that this was a fatal variance or failure of proof. Concerning the second of these names the trial judge says in his written decision: "The Japanese interpreter stated that the names 'Yamada' and 'Yamaguchi' are written almost the same in Japanese and that he is not sure but that the name written is 'Yamaguchi'. A difficulty here is that the name is signed by mark and that the translation offered by the plaintiff in which the name is spelled 'Yamada' was made by the same man who wrote the Japanese assignment and the names of those who signed by mark. If he wrote 'Yamaguchi' in Japanese he must have when he came to translate the assignment into English forgotten what he wrote and made a mistake in reading his own writing. However no Yamada Kinzo appears otherwise to have had anything to do with the matters involved in this case and one of the assignors testifies that Yamaguchi was present at Mr. Kaeo's house and signed with the other six named. This witness did not identify the document but his testimony sufficiently identifies the translation with the document offered in evidence and I find that it was executed by the seven named in plaintiff's complaint as assignors to S. K. Kaeo." This finding, that the signature is "Yamaguchi Kinzo" and not "Yamada Kinzo" is sufficiently borne out by the evidence. In Japanese signatures the surname precedes the baptismal or given name. Miyazaki (or Miyadaki) and Yamaguchi are family names and it is not contended that the mere omission of the baptismal names, Akitaro and Kinzo, in the declaration or their addition in the signatures to the assignment constitutes a variance. As to the difference in spelling between "Miyadaki" and "Miyazaki" (the same Japanese characters, the evidence shows, are used in writing "Miya-

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zaki" and "Miyasaki") we adhere to the rule laid down in 1894 in the case of *Republic v. Oishi*, 9 Haw. 641, where the court said, with reference to an alleged variance between "Ois" and "Oishi", a Japanese name: "We do not hold anyone to extreme strictness in the paraphrasing or Anglicizing of names foreign to the English tongue, especially when a Hawaiian undertakes to write a Chinese or Japanese name, and whose unaccustomed ears are not sensitive to the pronunciation of their names by the persons themselves." The rule is founded on reason and is applicable to the case at bar.

Under the exceptions the argument is made that the evidence shows that the plaintiff's assignors together with others were partners in the performance of the work for the McBryde Sugar Company and as such partners were entitled to the amount now in suit as "profits" of their undertaking; that prior to the assignment plaintiff had knowledge of the fact that others than the plaintiff's assignors were interested in the "profits"; that the seven assignors, as members of this non-trading partnership were without authority to assign the whole claim to plaintiff; that plaintiff took the assignment with notice of its invalidity and is not entitled to recover; and that the evidence was erroneously excluded which tended to show that plaintiff accepted the assignment with notice. This defense cannot prevail, in view of the fact that defendant admitted in his answer that the amount claimed by plaintiff in this action was due by the defendant to the plaintiff's assignors, thus excluding the theory of a partnership by them with others. If the debt was due to the seven only, it was competent for them to assign their claim.

The exceptions are overruled.

Plaintiff in person.

S. E. Hannestad (*Prosser, Anderson & Marx* with him on the brief) for defendant.

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A. K. TING v. EARNEST O. BORN.

MOTION TO QUASH WRIT OF ERROR.

ARGUED SEPTEMBER 2, 1913.

DECIDED SEPTEMBER 15, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

APPEAL AND ERROR—*when writ of error may be had—execution subsequently satisfied.*

Under Sec. 1869, R. L., "a writ of error may be had by any party deeming himself aggrieved by the * * *" judgment of any court, "except the supreme court, * * * at any time before execution thereon is fully satisfied, within six months from rendition of judgment;" and, where a writ of error is had at 2:05 p. m. and execution, which was issued at 11:45 a. m., is returned at 3:30 p. m. satisfied, the writ, notwithstanding the subsequent satisfaction of the execution, was properly had and the assignments of error may be examined.

Id.—*application for writ of error—prayer therefor.*

A writ of error in civil cases issues as a matter of right upon application to the clerk, by any party to the original cause or by any personal representative of a deceased party, and such application need not contain a prayer for the writ.

PARTIES—*garnishee without interest in proceedings in error not a necessary party.*

Where a bank as garnishee appears in the court below and makes disclosure showing funds in its possession to the credit of the defendant in excess of the amount of the plaintiff's claim, as well as in excess of the judgment thereafter rendered, and there being no question or dispute as to the amount of the deposit in the bank to the credit of the defendant, and it appearing that the garnishee has no interest in the litigation or in the result thereof, such garnishee is not a necessary party to the proceedings in error brought by the plaintiff in error (defendant below).

OPINION OF THE COURT BY DE BOLT, J.

A writ of error to the circuit court of the second circuit having issued to review a judgment entered in an action wherein Alfred K. Ting (the defendant in error) was plaintiff and

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Earnest O. Born (the plaintiff in error), was defendant and the First National Bank of Wailuku was garnishee, the defendant in error, upon the record being filed in this court pursuant to the writ, filed a motion to quash the writ and dismiss the proceedings in error on the following grounds: (1) that the judgment and execution thereon are fully satisfied; (2) that the garnishee is not a party to the proceedings in error; (3) that the writ of error issued without authority, there being no prayer therefor in the petition; (4) that the writ and the proceedings in error are defective, in that the case was not brought up under the title of the case below, the names being reversed; (5) that the assignments of error do not allege any error with such particularity as to enable this court or the defendant in error to ascertain the precise ruling or rulings intended to be reviewed.

The record shows that to the complaint filed by the plaintiff in the court below the defendant filed an answer denying generally all the allegations therein contained, and the garnishee filed a disclosure showing that the defendant had the sum of \$459.38 to his credit on deposit with the garnishee; that judgment was entered on July 2, 1913, in favor of the plaintiff and against the defendant and the garnishee for the sum of \$380 and costs; that execution issued at 11:45 a. m. on July 11 and was returned at 3:30 p. m. on the same day fully satisfied, the garnishee having paid the same out of the money held by it on deposit to the credit of the defendant; that the writ of error was issued by the clerk of this court at 2:05 p. m. on July 11 and filed in the court below and served on the defendant in error on July 12.

1. As to the first ground of the motion, namely, that the judgment and execution are fully satisfied. Section 1869, R. L., provides that "A writ of error may be had by any party deeming himself aggrieved by the decision of any justice, judge or magistrate, or by the decision of any court, except the supreme court, or by the verdict of a jury, at any time before

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execution thereon is fully satisfied, within six months from the rendition of judgment."

The writ of error, it will be observed, issued at 2:05 p. m. and the execution, which had issued at 11:45 a. m., was returned at 3:30 p. m. fully satisfied. The record, however, does not show the exact hour between 11:45 a. m. and 3:30 p. m. when the execution was actually paid and satisfied. If, as a matter of fact, the execution were fully paid and satisfied before the hour of 2:05 p. m. this was a fact incumbent on the defendant in error to show. He has not shown this fact and it does not otherwise appear. It cannot be assumed or imported into the record by presumption. Hence, upon the record now before us, the plaintiff in error was entitled to the writ, it not appearing that at the time he applied for it and the same was issued that the execution was then satisfied.

The writ of error having issued before the execution is shown to have been satisfied, notwithstanding the fact that it was subsequently satisfied, the plaintiff in error has the right to have the alleged errors examined by this court and the judgment reversed if prejudicial error has been committed by the court below. The statute only modifies the common law rule to the extent that the writ must issue before execution has been fully satisfied. At common law the writ might issue after as well as before execution was satisfied. Thus, in *Dakota County v. Glidden*, 113 U. S. 222, 224, Mr. Justice Miller, speaking for the court, says: "There can be no question that a debtor against whom a judgment for money is recovered may pay that judgment and bring a writ of error to review it, and if reversed can recover back his money. And a defendant in an action of ejectment may bring a writ of error, and failing to give a supersedeas bond, may submit to the judgment by giving possession of the land, which he can recover if he reverses the judgment by means of a writ of restitution. In both these cases the defendant has merely submitted to perform the judgment of the court, and has not thereby lost his right to seek

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a reversal of that judgment by a writ of error or appeal." See also *Hoogendorn v. Daniel*, 202 Fed. 431, 432; *Kenney v. Parks*, 120 Cal. 22, 24; *Burrows v. Mickler*, 22 Fla. 572, 574; 2 Cyc. 647.

2. As to the second ground of the motion, namely, that the garnishee is not a party to the proceedings in error. "The general rule with regard to parties is that every person to be directly affected in his interests or rights by a judgment on appeal or writ of error is entitled to be named or described in the application or writ, to have notice thereof, and an opportunity of being heard and defending his rights." 2 Cyc. 756, 757; 7 Ency. Pl. & Pr. 860, 861; *Castle v. Kapiolani Est.*, 16 Haw. 33, 34. Does the garnishee, under the circumstances disclosed by the record in this case, come within the terms or reason of the rule laid down by the authorities cited? We think not. In the court below the contesting parties were the plaintiff and the defendant, the sole question being, whether the defendant was indebted to the plaintiff or not. This question in no way concerned the garnishee. It had no interest in the suit or in the result thereof. It was a matter of total indifference to the garnishee whether judgment was rendered for the plaintiff or for the defendant. There was no question or dispute as to the amount of the deposit in the bank to the credit of the defendant. Neither has the garnishee any interest in the proceedings in error now before this court. It is immaterial to the garnishee whether the judgment be reversed or affirmed. Having appeared in the court below and made disclosure of funds in its possession to the credit of the defendant (plaintiff in error) in excess of the amount of the plaintiff's claim, as well as in excess of the judgment thereafter rendered and costs, the garnishee cannot be deemed to be "aggrieved" by the judgment rendered. There is no possible ground upon which the garnishee could claim the right to be heard in this court. It is apparent that there are but two parties who have any interest in the present litigation, namely, Earnest O. Born, the plaintiff

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in error, and Alfred K. Ting, the defendant in error. We, therefore, hold that the garnishee, having no interest in the question being litigated, is not a necessary party to the proceedings in error. The case thus presented by the record is clearly and fundamentally distinguishable from cases wherein the rights and interest of the garnishee are involved. *Juilliard & Co. v. May*, 130 Ill. 87; *Tuthill v. Moulton*, 58 Pac. 1031; *Yerkes v. McGuire*, 54 Kan. 614; *Gregg v. Baldwin*, 62 Pac. 727; *Reese & Ellis v. Couyers & Co.*, 16 La. Ann. 39; *Copley v. Snow*, 3 La. Ann. 623; *Greenman v. Melbye*, 78 Minn. 361.

Upon the proposition that the garnishee is not a necessary party to the proceedings in error, because of a lack of interest in the litigation, we cite the following authorities: *Railroad v. Johnson*, 15 Wall. 8, 9; *Mercantile Trust Co. v. Kanawha & O. Ry. Co.*, 58 Fed. 6, 11, 13, 14; *Galveston H. & N. Ry. Co. v. House*, 102 Fed. 112, 114; *Raub v. Relief Association*, 3 Mackey (D. C.) 68, 77; *Loring v. Wittich*, 16 Fla. 323, 324; *Gray v. Dryden*, 79 Mo. 106; *DeVaughn v. Byrom*, 36 S. E. 267, 268; *Western Union Tel. Co. v. Griffith*, 36 S. E. 859, 861; *Town of Albuquerque v. Zeiger*, 25 Pac. 787; *Castle v. Kapiolani Est.*, 16 Haw. 33, 35; 2 Cyc. 757-760; 7 Ency. Pl. & Pr. 863, 865; *Barner v. Gorden*, 16 La. Ann. 324.

3. As to the third ground of the motion, namely, that the writ issued without authority, there being no prayer therefor in the petition. Under section 1874, R. L., a writ of error in civil cases issues as a matter of right upon application to the clerk of the court, by "any party to the original cause or of any personal representative of a deceased party." *Fitch v. Watson*, 15 Haw. 316, 317. The statute does not in express terms require that the "application" for the writ be in writing. Whether an oral application would be sufficient we need not say inasmuch as the application for the writ in this case was in writing and was signed by the plaintiff in error. The application, following the title of the cause, is entitled: "Petition for writ of error."

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It will be observed that the application is not to be made to a judge or to a judicial tribunal, exercising judicial powers, but to the clerk, a ministerial officer. We think the application in this case was sufficient and that the writ was properly issued. Here, as well as in other jurisdictions, the writ issues as a matter of right. See *Pembroke v. Abington*, 2 Mass. 141; *Anonymous*, 16 N. J. L. 271; *First National Bank of Orlando v. King*, 18 So. 1; *Van Antwerp v. Newman*, 4 Cow. (N. Y.) 82, 84; *Louisville Trust Co. v. Stockton*, 72 Fed. 1, 2.

4. As to the fourth ground of the motion, namely, that the case is not brought up under the title of the case below, as required by Rule 9 of the rules of this court. The plaintiff in error, at the oral argument, moved for leave "to amend the petition in error, assignments of error, and writ of error, by writing in lieu of the names of the parties as given in the caption the following, to-wit: *A. K. Ting*, defendant in error, vs. *Earnest O. Born*, plaintiff in error." The motion to so amend is granted, and the amendments may be made accordingly.

5. As to the fifth ground of the motion, namely, that the assignments of error do not point out the alleged errors with sufficient particularity. One, at least, of the assignments in error, namely, "that plaintiff in error was deprived of a full, fair and impartial trial in said cause by the remarks of the court beginning with and continuing during the entire course of the trial," is sufficiently clear to enable the court to consider it.

The motion to quash the writ of error and dismiss the proceedings in error is denied.

E. R. Bevins for the motion.

Andrews & Quarles and *Eugene Murphy* contra.

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SAM NAWELO v. VON HAMM-YOUNG COMPANY,
LIMITED, A CORPORATION.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED SEPTEMBER 15, 1913.

DECIDED SEPTEMBER 30, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

EVIDENCE—*res gestae*—*spontaneous declaration*.

A declaration to be part of the *res gestae* in a personal injury case need not be strictly contemporaneous with the transaction or event to which it relates; it is enough that it was a spontaneous utterance engendered by the excitement of the main event made immediately after and under the influence of the occurrence and so connected with it as to characterize or explain it.

TRIAL—*instructions*.

Instructions need not be given in the language requested if those which are given correctly state the law and fairly and sufficiently cover the ground. But where instructions are asked which correctly state the law on any issue presented it is error to refuse to give them unless the points are adequately covered by the instructions given. It is generally considered error to refuse to give a requested instruction on a given point which is accurate and applicable though the point may have been inferentially covered by a general instruction which was given.

OPINION OF THE COURT BY ROBERTSON, C.J.

This is an action for damages for personal injury alleged to have been sustained by the plaintiff by having been run against by an automobile operated by an employee of the defendant. The jury returned a verdict for the plaintiff. The defendant brings exceptions seeking to have reviewed certain rulings made by the trial court involving questions as to the sufficiency of the evidence for the plaintiff, the admission and rejection of certain testimony over defendant's objections and the giving and refusing respectively of certain instructions to the jury.

It appeared by uncontradicted testimony that on July 10, 1912, the day of the accident, one Henry Hustace was in the

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employ of the defendant as salesman, demonstrator and chauffeur in the auto sales department of the corporation; that on the morning of that day he was instructed by a superior to drive an automobile belonging to the defendant from the Young residence at the corner of King and Victoria streets, in Honolulu, to the company's salesroom; that the shortest route from the Young residence to the salesroom lay directly along King street; that in taking the automobile in Hustace diverged from King street through the capitol grounds to Hotel street in order to call at the Royal Hawaiian Garage; that he drove into that garage and after remaining there a few minutes proceeded to leave by backing the automobile out through the entrance, across the sidewalk into Hotel street; that in so backing out the machine was swung over towards Richards street and against and partly over the body of the plaintiff, an employee of the water works bureau, who was engaged at the time at an excavation made in the street for the purpose of severing a supply pipe from the water main in the street.

It was not contended that the mere fact that the chauffeur deviated from the direct route would constitute a defense to the action if the company were otherwise liable, but it was contended that the evidence showed that the deviation was made by the chauffeur for purposes purely his own and in actual disloyalty to his employer, and, hence, that at the time of the accident he was not acting within the scope of his employment as a servant of the defendant. Upon this ground the defendant moved for a directed verdict and for judgment notwithstanding the verdict. The circumstances in this connection were shown by the testimony of Hustace to have been substantially as follows: Some time prior to the day of the accident one Pay had called at the defendant's salesroom to make inquiries with the view to purchasing an automobile and had been spoken to by another salesman named West about a certain second-hand machine; that West turned the matter over to Hustace, asked the latter to show the machine to Pay, and went away; that Pay

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asked Hustace what he thought about the machine, and Hustace replied that he was not in a position to tell him exactly what he thought about it; that on the morning of the accident Pay asked Hustace over the telephone to meet him at the Royal Hawaiian Garage as he wanted to see him in regard to a car; that on the occasion in question Hustace called at that garage for two purposes, namely, to see Pay with reference to the sale of a machine, and to see one Harris upon a business matter of his own; that on meeting Pay at the garage the latter asked him for his opinion in regard to the car that he (Pay) was thinking of purchasing; that Hustace told Pay that that car was not in good condition, was not the right kind of a car for his work, and advised him to buy another car which the company had in stock and which Pay eventually did purchase though Hustace did not himself effect the sale.

We need express no opinion on the point whether the jury was at liberty to draw from this testimony the inference which defendant's counsel drew. We are clearly of the opinion that the jury could properly have found, as they evidently did find, that Hustace was acting honestly and in the best interest of his employer as he saw it, and that there was no error of which the defendant can complain in it having been left to the jury under appropriate instructions to find from the testimony whether at the time of the accident Hustace was acting within the scope of his employment as a servant of the defendant or was proceeding as his own master about an undertaking of his own.

In the several exceptions taken to rulings upon the admission and rejection of evidence we find no reversible error, and shall advert particularly to only one of them. Over the objection of the defendant's counsel a witness was allowed to testify to a conversation had with Hustace immediately after the plaintiff was injured and before he was taken to the hospital. The witness who saw the occurrence testified that she had upbraided the chauffeur saying "This is one of the most careless things I ever saw—backing out of the garage into the street and not

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making any sound at all," and that the chauffeur replied "But the governor got away from me." What the witness had said to the chauffeur was afterwards stricken out as it should have been, but the chauffeur's reply was allowed to remain in evidence. The record shows that in arguing a motion to strike out the testimony defendant's counsel said that the "statement of Mr. Hustace's as to losing control of the governor is vague and indefinite and means nothing." The improper admission of a bit of vague and meaningless evidence would hardly be regarded as prejudicial error. However, assuming that the testimony could have been considered by the jury as tending to explain or account for the accident, the question is whether the statement was properly admitted as part of the *res gestae*. On behalf of the defendant it is claimed that the statement was not explanatory of anything in which the declarant was then engaged and that as it did not accompany the act from which the injuries in question arose it was the mere narration of a past occurrence which should have been excluded as hearsay. The case of *Vicksburg & M. R. R. v. O'Brien*, 119 U. S. 99, is largely relied on. In that case the statement of the engineer of a railroad train as to the rate of speed at which the train was moving at the time an accident occurred made between ten and thirty minutes after the occurrence was held not admissible as part of the *res gestae*. It is to be regretted that the exact circumstances under which the statement in that case was uttered were not made to appear. In the case at bar we think the statement was part of the *res gestae* and properly admitted as such. It was made at the spot where the accident occurred immediately after it had happened and in the presence of the injured party. A declaration to be part of the *res gestae* need not be strictly contemporaneous with the transaction or event to which it relates; it is enough that it was a spontaneous utterance engendered by the excitement of the main event made immediately after and under the influence of the occurrence and so connected with it as to characterize or explain it. 24

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A. & E. Enc. Law (2nd ed.) 664 *et seq*; *Torson v. Beckley*, 20 Haw. 406; *Westall v. Osborne*, 115 Fed. 282; *Sample v. Ry. Co.*, 50 W. Va. 472. In the case last cited it was pointed out that Mr. Justice Harlan who wrote the majority opinion in *Vicksburg & M. R. R. v. O'Brien* subsequently became the author of the opinion in the case of *Peirce v. Van Dusen*, 78 Fed. 693, where a statement made by the conductor of a train immediately after an occurrence in which a brakeman of the railroad was injured was held admissible. Much of what was there said in approval of the admission of the statement in that case is applicable to the case at bar in favor of the admission of the declaration made by Hustace. In *Westall v. Osborne*, *supra*, the evidence consisted of declarations made by fellow servants of the plaintiff after the happening of the accident by which he was injured, and it was held that evidence of what was said "very shortly after" as well as of statements made "just after" the event was properly admitted.

The remaining exceptions, of which there are several, relate to the charge given to the jury and to the refusal of the court to give certain instructions requested by the defendant. It appears that the trial judge refused all the instructions in the form requested by respective counsel regardless of their merits and proceeded to charge the jury in his own way. This practice, which is followed by some of the circuit judges, was brought to the attention of this court in *Bright v. Quinn*, 20 Haw. 504, without calling forth any special comment. The practice is permissible and is not to be discouraged. A complete and thoroughly impartial charge free from the partisan colorings and repetitions which are liable to creep into instructions prepared by counsel will present a case to the jury in the most desirable way. But where the practice is exercised it is incumbent upon the trial judge to see to it that the jury are instructed fully and fairly from the standpoint of each of the contending parties, and that no point of importance upon which a proper instruction has been requested is overlooked. Under the statute

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it is not incumbent upon the court, in cases where the parties are represented by counsel, to charge the jury upon the law unless so requested in writing, but on the contrary it is made "the duty of counsel" to furnish the court with written requests for instructions upon which, in case of objection, counsel are entitled to be heard. R. L. Secs. 1801, 1802. The court may and in furtherance of justice generally will instruct the jury upon points on which appropriate instructions have not been requested by counsel, though the statute does not require it. Hence it is that an attorney, mindful of his duty to his client, will have prepared for submission to the trial judge at the proper time a set of instructions designed to elucidate to the jury the law of the case from his client's point of view. Correct instructions which have been thus carefully prepared should not be lightly brushed aside unless the court is prepared to give the necessary time to the preparation of a complete charge. It is well settled in this jurisdiction that mere non-direction on matters of law is not ground of error where specific instructions have not been requested. *Sylva v. Wailuku Sug. Co.*, 19 Haw. 602, 609; *Territory v. Furomori*, 20 Haw. 344, 350. Also that instructions need not be given in the language requested if those which are given correctly state the law and fairly and sufficiently cover the ground. *Bright v. Quinn, supra*; *Ferreira v. Honolulu R. T. & L. Co.*, 16 Haw. 615. But we take it to be equally well settled that where instructions are asked which correctly state the law on any issue presented it is error to refuse them unless the points are adequately covered by the instructions given. 38 Cyc. 1718, 1719; *Denver City Tram Co. v. Norton*, 141 Fed. 599, 608; *Strubble v. De Witt*, 81 Neb. 504; *Hunt v. Tp.*, 165 Mich. 187, 199; *Boswell v. Thompson*, 49 So. (Ala.) 73; *Chenoweth v. R. Co.* 53 Ore. 111, 121; *Waniorek v. R. Co.*, 17 Cal. App. 121, 128; *Penny v. R. Co.*, 153 N. C. 296, 302; *Isley v. Bridge Co.* 143 N. C. 51; *Mallen v. Waldowski*, 203 Ill. 87; *R. Co. v. King*, 115 S. W. (Ky.) 196; *R. Co. v. Johnson*, 16 S. E. (Ga.) 49, 51; *Parkhill v.*

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Brighton, 61 Ia. 103, 108; *R. Co. v. Foth*, 101 Tex. 133, 144. The cases cited go to show that it is generally considered error to refuse to give a requested instruction on a given point which is accurate and applicable though the point may have been inferentially covered by a general instruction which was given.

We find that the charge given in this case was free from objection so far as it went, and we overrule the exception which was noted to a part of the charge which dealt with the question of agency. We feel obliged to hold, however, that reversible error was committed by reason of the refusal of the court to give certain instructions which were requested by the defendant upon points which were not covered except indirectly and by inference in the charge given.

In the charge negligence and contributory negligence were defined and the jury were instructed in brief and general terms that if they should find that Hustace was not guilty of negligence, or if they should find that the plaintiff was guilty of negligence which contributed proximately to his injury their verdict should be for the defendant. In this connection the defendant requested these additional instructions which were refused: "5. The mere happening of a casualty is not evidence of negligence. The presumption is that in the performance of a lawful act ordinary care is used. In this case the mere fact that the plaintiff was injured or that the auto backed into the plaintiff is not in itself alone evidence of negligence. In spite of those admitted facts the burden is still upon the plaintiff to prove by other evidence that the chauffeur did not on that occasion use the same degree of care and prudence in the management of his auto which an ordinarily careful and prudent driver of automobiles would have used under the same circumstances." "17. For an accident purely unavoidable no one is liable. If all persons concerned in a collision on a public highway do and omit to do all that ordinarily prudent and careful persons placed under the same circumstances would have done and omitted to do and still an injury results, that

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injury is an unavoidable accident and the results of it, whether it be suffering, or payments of money, or other financial loss, must be left upon those upon whom they were unfortunately placed by the accident itself." Counsel for plaintiff do not claim that these instructions were incorrect or objectionable, but they contend that the points were sufficiently covered by the charge. With this we do not agree. It is true that the propositions contained in the requested instructions were inferable from what the court said to the jury about negligence, contributory negligence, the effect of either, and as to the burden of proof being upon the plaintiff, but the question of unavoidable accident was also involved and nothing in the charge was calculated to call to the attention of the lay mind the points covered by these requests. There is merit in the contention of defendant's counsel that the case from the standpoint of the defense was not fully and fairly covered by the charge and that the defendant was entitled to have the jury instructed as requested.

There were two other requested instructions which we think ought to have been given. Standing by themselves they were of small importance but taken in connection with the refusal to give the requests above mentioned they add somewhat to the force of the defendant's complaint. They were as follows: "3. Briefly, I instruct you that the questions of fact arising in this case for your decision are as follows: (1) Did the injury complained of arise through the negligent act of the chauffeur?; (2) Was the chauffeur in question in the employ of the defendant and acting within the general scope of his employment at the time of the accident?; (3) Was the plaintiff guilty of negligence, causing or directly contributing to the accident?; (4) Was the collision the result of unavoidable accident?; (5) What damage has been sustained by plaintiff, if any? As to these several questions the court will endeavor to give you the law which shall control your deliberations in arriving at your answers thereto." And "19. * * * * If you find that the evi-

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dence bearing upon the plaintiff's case is evenly balanced or that it preponderates in favor of the defendant, then the plaintiff cannot recover and you should find for the defendant." The first of these requests was well calculated to assist the non-professional mind in singling out and considering the issues involved in the case and included in the charge as given, and we know of no good reason for the refusal to give it. The second was a part of the usual instruction as to the burden of proof in civil cases. See *Strubble v. De Witt*, *supra*.

We find no error in the exceptions taken to the court's refusal to give other requested instructions.

For the errors above specified the verdict is set aside and a new trial granted.

Lorrin Andrews (*Andrews & Quarles* on the brief) for plaintiff.

E. C. Peters for defendant.

A. K. TING v. EARNEST O. BORN.

ERROR TO CIRCUIT COURT, SECOND CIRCUIT.

ARGUED SEPTEMBER 22, 1913.

DECIDED OCTOBER 4, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

PLEADING—*allegation and proof—variance.*

Where, in an action of assumpsit, it is alleged that the defendant is indebted to the plaintiff in the sum of \$600 as a portion of the purchase price of a certain automobile and the proof is, that the plaintiff being the owner of a Hupmobile of the value of \$700 and the defendant being the owner of an E. M. F. car of the value of \$1450, they agreed to and did exchange cars, and in consideration of the difference in value of the cars the plaintiff promised to pay the defendant the sum of \$750; that thereafter they agreed that the defendant take the E. M. F. car back and pay the plaintiff the sum of \$600 for the Hupmobile, which the

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defendant was to retain. Held, that the legal effect of the latter transaction was a sale of the Hupmobile by the plaintiff to the defendant; that the first contract was abrogated and rescinded by the second contract; and that there was no variance between allegation and proof.

TRIAL—remarks of the court in presence of the jury.

Counsel having moved that the witnesses be excluded from the court room, the court remarked, "I see no witnesses here except one, and he is a banker." Held, that the natural and reasonable construction to be placed upon the remark of the court is, that the court thereby intended to convey the idea that there was but one witness in the court room, and that the standing or credibility of the witness was not thereby alluded to or implied.

ID.—remarks of court evoked by motion for nonsuit.

Counsel having moved for a nonsuit, the court and counsel thereupon, in the presence of the jury, entered into a discussion as to the legal effect of the plaintiff's complaint. The court thereafter instructed the jury to disregard the remarks of the court so made. Held, under the circumstances of this case, that the remarks were not prejudicial error.

OPINION OF THE COURT BY DE BOLT, J.

This is a writ of error to review a judgment of the circuit court of the second circuit. The record having been sent up in response to the writ the defendant in error filed a motion to quash the writ and dismiss the proceedings in error and the motion having been denied (ante 638), the case now comes before us on its merits.

The complaint filed by the plaintiff (defendant in error) in the court below alleges, among other things, "that on to wit, the 20th day of November, A. D. 1912, the defendant" (plaintiff in error) "became indebted to the plaintiff in the sum of six hundred dollars (\$600.00), as a portion of the purchase price of a certain automobile by the plaintiff sold and delivered to the defendant," The complaint further alleges the payment of \$225 by the defendant on the alleged indebtedness, thus leaving a balance of \$375 due the plaintiff. The jury returned a

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verdict for the plaintiff for the sum of \$380 including interest. Judgment was entered accordingly.

At the trial in the court below the plaintiff testified that in the month of October, 1912, he being the owner of a Hupmobile of the value of \$700 and the defendant being the owner of an E. M. F. car of the value of \$1450, they mutually agreed to and did then exchange cars, and that in consideration of the difference in value of the cars he gave the defendant his check for \$500 and promised to pay him the further sum of \$250 in installments; that "a month after that, or some time in November," the defendant told him that "he made a fool of himself for taking" the Hupmobile "for seven hundred, which is too high a price;" that "one day" he told the defendant, "I will cut down a hundred dollars off the Hupmobile if he will take the E. M. F. back, which he agreed to;" that "on the 20th day of November, 1912, Born gave me a check of six hundred dollars which I had given to him. I destroyed that five hundred dollar check in his presence but kept the six hundred dollar check and told him he had two machines. That is the six hundred dollars for the purchase of the Hupmobile. At the time he gave me the check for six hundred, he told me he didn't have enough in the bank to meet that check but that he would have it in two weeks. After two weeks went by I asked him about it and he told me he expected some money from the Coast which didn't arrive and he asked me to hold on and he would make good."

D. C. Lindsay, cashier of The Baldwin National Bank of Kahului, a witness for the plaintiff, testified that the check for \$600 "was presented at the bank but payment was refused on account of lack of funds;" that he heard a conversation between the plaintiff and the defendant wherein the defendant said, regarding the plaintiff's claim of \$375, that "he would pay it in small installments as he was able."

The testimony of the defendant, as to the principal facts in the case, was substantially the same as that of the plaintiff.

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The contention of the defendant being, however, that he took the E. M. F. car back to sell for the plaintiff as his agent, and that all the while it was known, agreed and understood between them that the defendant was the agent of the Schuman Carriage Company. There was some evidence tending to support this theory of the transactions between them.

Upon the defendant's attention being called to the testimony of Mr. Lindsay, that he heard him say that he would pay the plaintiff "in small installments as he was able," the defendant said: "I think he made a mistake."

The assignments of error are, (1) that the plaintiff in error (defendant below) was deprived of a full, fair and impartial trial by the remarks of the court beginning with and continuing during the entire course of the trial; (2) that the verdict is contrary to the law and the evidence in that the contract declared upon is alleged to have been entered into on November 20, 1912, whereas the contract upon which the verdict is predicated is shown to have been entered into on or about December 15, 1912, and is a separate and independent contract in nowise connected with the contract alleged in the pleadings.

1. As to the first assignment of error. The remarks of the court complained of were made in the following manner, that is to say, upon the jury being sworn to try the cause and counsel for the defendant having moved that the witnesses be excluded, the court replied: "I see no witnesses here except one and he is a banker;" also (the plaintiff having rested and the defendant having moved for a nonsuit on the ground that the evidence did not show a contract for the sale of an automobile, but a contract of barter, and that the defendant was acting as agent for the Schuman Carriage Company), this colloquy between court and counsel occurred:

"The Court: This is a suit, is it not, for money due and owing? Mr. Murphy: For the sale of an automobile. The Court: Have you the complaint there? Mr. Murphy: Yes. The Court: Show me where it says it was for the sale of an

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automobile. Mr. Murphy: (Reading) 'That on to wit: the 20th day of November, A. D. 1912 the defendant became indebted to the plaintiff in the sum of six hundred dollars—' The Court: (Int.) Now, suppose you strike out all the rest of that paragraph. Mr. Murphy: 'As a portion of the purchase price of a certain automobile.' The Court: That was simply thrown in. The allegation there is for an indebtedness of six hundred dollars. Mr. Murphy: I take it that it is a money count. The Court: It is an allegation of an indebtedness of six hundred dollars. Mr. Murphy: For goods sold and delivered. The Court: It doesn't say that. It says: 'That on to wit the 20th day of November, A. D. 1912 the defendant became indebted to the plaintiff in the sum of six hundred dollars.' The rest is merely in explanation. All that after 'As' is there to inform the defendant as to how he became indebted to the plaintiff. It is not a part of the allegation at all. It is on the 20th day of November that he became indebted in the sum of six hundred dollars. Stop right there and it is complete. Mr. Murphy: I don't think it would survive a demurrer. Suppose it was a promissory note. The Court: (Reading) 'That the said defendant being so indebted unto the said plaintiff in consideration thereof undertook and agreed to pay to the said plaintiff the said sum of six hundred dollars upon the said date, to-wit: the 20th day of November, 1912.' That is the allegation of the debt and the surplusage in there shows how the debt originated. Mr. Murphy: The evidence is that in consideration that Mr. Born took the E. M. F. back Mr. Ting would then take off a hundred off the Hupmobile that had been taken as part payment on the E. M. F., how would that— The Court: The fact that he promised to pay six hundred dollars is alleged and it is also alleged that he has not paid it. Going to the proof, the proofs show that as promise or evidence of the six hundred dollar debt he gave his check for six hundred dollars. Is that not the evidence? Mr. Murphy: There is evidence of that. The Court: That is sim-

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ply evidence of two things. First, that he owed six hundred dollars and he paid it by check on which funds could not be obtained. He made two payments toward that check, which goes to recognize the check as demand against him. Mr. Murphy: Is the suit on a check or on an automobile? The Court: Neither. It is for indebtedness and the check is merely evidence of the indebtedness. All that has been said about automobile has nothing to do with the evidence. Mr. Murphy: It is in the pleadings, and in the evidence. (Pause) Will the court rule on the question of agency. The Court: I overrule your motion, to which you may have an exception." Also (counsel having made a statement of the defendant's case to the jury), the court said: "If you show those facts, they are entitled to judgment;" to which counsel replied: "That is my offer of proof. If Your Honor thinks that is not sufficient, a directed verdict in favor of the plaintiff should be rendered." "The Court: Your witnesses will be your offer of proof."

It is urged on behalf of the plaintiff in error that the remark of the court, "I see no witnesses here except one, and he is a banker," gave undue prominence to the testimony of that witness, and that the court thereby intimated to the jury that "the honesty and integrity of this witness, the banker, Mr. Lindsay, is not to be questioned." We do not think that the remark of the court can reasonably be so construed. It, possibly, is susceptible of more than one consideration. We think, however, that the natural and reasonable construction to be placed upon the remark is, that the court thereby intended to convey the idea that there was but one witness in the court room, and that the standing or credibility of the witness was not alluded to or implied. Where a reasonable and proper construction can thus be applied, one, such as counsel contends for, though it may be a possible construction, should not be accepted by the court. We see no prejudicial error in the remark of the court. It is not claimed that the witness remained in the court room during the examination of other witnesses.

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As to the remarks of the court evoked by the motion for a nonsuit, while some of them are not entirely free from objection, we cannot say that they were prejudicial to the defendant. Upon the motion for a nonsuit being made the proper procedure, however, was to have the jury excluded from the court room during argument on the motion. But it seems that neither party suggested this method of procedure, nor objected to the discussion in the presence of the jury. It will be observed that the court and counsel were discussing the legal effect of the plaintiff's complaint—construing it—and the remarks were not, in effect, comment on the evidence, nor intended as such. "The construction of the pleadings is, of course, always a question for the court." Thompson on Trials, 2d. ed. Sec. 1027. If, however, the remarks of the court, made in this connection, had any improper influence on the jury such prejudicial effect must be deemed to have been removed by the following instruction of the court: "I charge you that you are not to consider the court's refusal to grant a nonsuit in this case as an indication that your judgment should be for the plaintiff. The duty of the court is to present the case to you entirely. Anything that I have said to you in ruling on that motion is not to have any effect upon your decision." Upon the merits of the case the court charged the jury as follows: "It seems to me that there has been some little evidence here that was immaterial. I have no doubt that you understand the evidence thoroughly and are able to judge. If from the evidence you find that the defendant did owe six hundred dollars and as a promise to pay that debt, evidence of payment, gave his check for six hundred on which he has paid any sums whatever, two hundred or two hundred and twenty-five dollars, if from the evidence you find these are facts, you will bring in a verdict accordingly. If from the evidence you find that the transaction was not a transaction between Mr. Ting and Mr. Born but was understood by both parties to be between Mr. Ting and the Schuman Carriage Company, then you will find for the defendant."

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It is also urged that the remark of the court made at the close of the statement of the case for the defendant, namely, "If you show those facts, they are entitled to judgment," was prejudicial error. Counsel's statement of the case, however, is not in the record. For aught we know the statement may have been insufficient as a defense. In the absence of the record affirmatively showing error we cannot assume that the remark of the court was prejudicial. The defendant, as the record shows, was permitted to proceed with his evidence, which afforded him ample opportunity to amplify and extend his defense as the exigencies of the case might require. In other words, he was permitted to supply by evidence any deficiency there may have been in his statement of defense.

2. As to the second assignment of error, namely, that the verdict is contrary to the law and the evidence in that the contract declared upon is alleged to have been entered into on November 20, 1912, whereas the contract upon which the verdict is predicated was shown to have been entered into on December 15, 1912. There is no evidence of any transaction, contractual or otherwise, between these parties on December 15, 1912. The only transactions disclosed by the record were those of October and November, 1912, already referred to.

The contention is made on behalf of the defendant that the original contract was one of barter; that the title to the Hupmobile thereby passed from the plaintiff to the defendant; that the proof of contract, if any, was, that in consideration of the plaintiff returning to the defendant the E. M. F. car, the defendant would cancel the obligation resting on the plaintiff to pay the \$750, and the defendant was to pay to the plaintiff the sum of \$600; and that this transaction was not alleged, hence, there was a fatal variance between the allegations of the complaint and the proof. We think there was ample evidence, however, to sustain the verdict on the theory that the contract of October was rescinded and the contract of November was substituted, which, in legal effect, was a sale of the Hupmobile

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by the plaintiff to the defendant for the consideration of \$600. "As a contract is the result of agreement, so an agreement may put an end to a contract. Therefore a contract may be discharged at any time before the performance is due, by a new agreement with the effect of altering the terms of the original agreement or rescinding it altogether; and a claim under the original contract may then be met by the new agreement, so far as the latter operates to alter or rescind the former." 9 Cyc. 593-595; 35 Cyc. 128, 129. The contract of October being rescinded and the contract of November substituted therefor, it follows as a legal necessity that an action can only be maintained on the latter contract. The evidence adduced by the plaintiff tends to show that by the terms of this latter contract, which was a new, distinct and independent contract, all the respective rights and obligations of the parties created and imposed by the October contract were completely wiped out; that the October contract was rescinded and abandoned by mutual consent of the parties; that the title to the E. M. F. car reverted to the defendant; and that in consideration of the promise by the defendant to pay to the plaintiff the sum of \$600, the defendant was to retain the Hupmobile, which in contemplation of law was a sale. The title to the Hupmobile by this latter transaction momentarily reverted to the plaintiff and then, in consideration of the defendant's promise to pay to the plaintiff the sum of \$600, reverted in the defendant—the legal effect being, a sale of the Hupmobile by the plaintiff to the defendant. *Duncan v. Baird & Co.*, 38 Ky. 101; 35 Cyc. 158; *Milner v. DeLoach Mill Mfg. Co.*, 36 So. 765.

The verdict was responsive to the allegations of the complaint and amply sustained by the evidence. There was no variance between allegation and proof. The record being free from prejudicial error, the judgment is affirmed.

R. P. Quarles (*Andrews & Quarles* and *Eugene Murphy* on the brief) for plaintiff in error.

E. R. Bevins for defendant in error.

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J. H. SCHNACK v. H. O. CLARK, DEFENDANT;
INTER-ISLAND STEAM NAVIGATION COMPANY,
LIMITED, GARNISHEE.

APPEAL FROM DISTRICT MAGISTRATE OF HONOLULU.

ARGUED SEPTEMBER 28, 1913.

DECIDED OCTOBER 7, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

GARNISHMENT—*seamen's wages*.

Under the federal statutes the wages of a seaman engaged in the merchant trade between ports in this Territory, the seaman not having been shipped by a shipping commissioner, may be attached by a creditor in garnishment proceedings.

OPINION OF THE COURT BY ROBERTSON, C.J.

This is an appeal upon a point of law from a decision and order of the district court of Honolulu whereby the garnishee in the case was discharged. The action was assumpsit and the court gave judgment for the plaintiff against the defendant for the sum of \$40.10 but declined to hold the money due the defendant from the garnishee on the ground that the defendant was a seaman within the meaning of section 4536 of the Revised Statutes of the United States and that his wages are therefore not subject to garnishment. It was admitted that the defendant was a seaman, being a mate on one of the steamers belonging to the garnishee; that said steamer was engaged in the inter-island trade, plying between ports of this Territory; that at the time the summons was served upon the garnishee it owed the defendant the sum of thirty-eight dollars for wages; and that the defendant was not shipped by or through a shipping commissioner but was employed by contract directly with the garnishee. The question is whether upon these facts the court below erred in discharging the garnishee.

It is conceded that the defendant was engaged in the coast-wise trade.

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Counsel for the garnishee rely upon the provision of section 4536 of the Revised Statutes of the United States that "No wages due or accruing to any seaman or apprentice shall be subject to attachment or arrestment from any court." Counsel for the appellant contends that the case is controlled by the Act of Congress of June 9, 1874, and later federal legislation. The act mentioned provided that "None of the provisions of an act entitled 'An Act to authorize the appointment of shipping commissioners by the several circuit courts of the United States to superintend the shipping and discharge of seamen engaged in merchant ships belonging to the United States, and for the further protection of seamen,' shall apply to sail or steam vessels engaged in the coastwise trade, except the coastwise trade between the Atlantic and Pacific coasts," etc. 18 Stat. L. 65. The act the title of which was quoted in the later act as above shown was passed by Congress on June 7, 1872 (17 Stat. L. 262). and was carried into the Revised Statutes of 1874 which were enacted on June 22, 1874. But it was provided (R. S. Sec. 5601) that "The enactment of said revision is not to affect or repeal any act of Congress passed since the 1st day of December one thousand eight hundred and seventy-three, and all acts passed since that date are to have full effect as if passed after the enactment of this revision, and so far as such acts vary from, or conflict with any provision contained in said revision, they are to have effect as subsequent statutes, and as repealing any portion of the revision inconsistent therewith." The act of June 9, 1874, therefore, was not deprived of any force by reason of the enactment of section 4536. On the contrary, it seems reasonably clear that that section must be taken to have been amended by the sweeping provision of the act of June 9, 1874, which evidently was intended to take out of the operation of the shipping commissioners' act vessels and seamen engaged in the coastwise trade other than that between the Atlantic and Pacific coasts. Much force is added to this view by subsequent legislation. Section 2 of an act approved on June 19, 1886

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(24 Stat. L. 79) provided that "shipping commissioners may ship and discharge crews for any vessel engaged in the coastwise trade * * * at the request of the master or owner of such vessel" etc.; and an act approved on August 19, 1890 (26 Stat. L. 320) as amended by an act of February 18, 1895 (28 Stat. L. 667) and an act of March 3, 1897 (29 Stat. L. 689) provided that "when a crew is shipped by a shipping commissioner for any American vessel in the coastwise trade * * * as authorized by section two of an act approved June nineteenth, eighteen hundred and eighty-six * * * an agreement shall be made with each seaman engaged as one of such crew in the same manner as is provided by" certain sections of the Revised Statutes " * * and such seamen shall be discharged and receive their wages as provided by" certain other sections, including section 4536, "but in all other respects such shipment of seamen and such shipping agreement shall be regarded as if both shipment and agreement had been entered into between the master of a vessel and a seaman without going before a shipping commissioner: Provided, that the clothing of any seaman shall be exempt from attachment."

We think that the effect of this legislation is such that the wages of seamen engaged in the coastwise trade other than that between Atlantic and Pacific ports are not exempt from attachment unless the seaman was shipped by a shipping commissioner. It is difficult to account for the later legislation except upon the theory that it has been the understanding of Congress that the act of June 9, 1874, had the effect of abrogating the provisions of the act of June 7, 1872, and the corresponding sections of Title LIII of the Revised Statutes, of which section 4536 is one, so far as the coastwise trade, except that between Atlantic and Pacific ports, was concerned.

In the case of *Tax Assessor v. Tullett*, 17 Haw. 416, this court held that the wages of a seaman may not be attached or subjected to garnishee process after judgment against the defendant, that is, by proceedings supplemental to execution. In

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that case the plaintiff admitted that the defendant's wages could not be attached before judgment and the question presented in the case at bar was not raised there. That case was affirmed by the supreme court of the United States in *Wilder v. Inter-Island Navigation Co.*, 211 U. S. 239. The supreme court reviewed most of the earlier decisions, federal and state, which dealt with the subject of the attachment of seamen's wages, noted the conflict of views therein expressed, and said (p. 245), "We may premise that no contention was made in the Supreme Court of Hawaii, or in the assignments of error or argument in this court that §4536 was inapplicable because the steamship company was engaged wholly in the coastwise trade. This removes any question on that subject from the case and renders it unnecessary to decide whether the act of 1874, c. 259, 18 Stat. 64, had the effect to repeal §4536, so far as vessels thus engaged are concerned."

In *United States v. The Grace Lothrop*, 95 U. S. 527, 532, referring to the effect of the statute of 1874, the court said "the language of the act is in terms an explicit declaration that Congress never intended that the original act should apply to vessels engaged in any part of the coasting trade, except that between the Atlantic and Pacific coasts." In *United States v. Bain*, 5 Fed. 192, 195, after quoting from the statute of 1874, the court said, "This language is so broad and comprehensive that, in our opinion, its effect must be to strike from the Revised Statutes every provision therein which was taken from the act of 1872 relative to such coastwise vessels; and their operation must be restricted to vessels sailing on long foreign voyages or from the Atlantic to the Pacific coasts." See also *Ross v. Bourne*, 14 Fed. 858, 859. In *Eddy v. O'Hara*, 132 Mass. 56, 60, referring to the same point, the court said "Coasting voyages (except as specified) would thus seem to be taken wholly out of the provisions of the act of 1872." And following the dictum in that case it was held in *White v. Dunn*, 134 Mass. 271, that seamen's wages were not exempt from attachment except by statute and

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that wages due a seaman on a coasting voyage between ports on the Atlantic coast were subject to attachment by the trustee process.

All the cases above cited except that of *Wilder v. Inter-Island Navigation Co.* were decided prior to the enactment of the series of statutes above referred to beginning with the act of June 19, 1886.

In *Holland v. Steamship Helene*, Estee's Reports, 281, 284, decided in 1902, where it was held that the complainant's wages were exempt from attachment because he had shipped before a shipping commissioner, Judge Estee said "I am forced to the conclusion that the act of 1874, standing alone, might defeat a proceeding of this character in the event the complainant was employed on a vessel engaged in the coastwise trade. However, there have been several important amendments to the shipping commissioners act since the act of 1874, which shed a different light upon it." And after quoting from several of the statutes, the learned judge said, "It seems to be clear that in addition to the extension of the other provisions of the Revised Statutes enumerated in said act (Act of Feb. 18, 1895), it was the intention of Congress to remove the limitations arising through the act of 1874, in relation to the exemptions of seamen's wages in the coastwise trade, from all seamen shipping on vessels engaged in that trade, who shipped before a shipping commissioner."

In the case of *The Amelia*, 183 Fed. 899, decided in 1910, District Judge Toulmin held apparently without reservation that the wages of seamen employed on coastwise merchant vessels are not subject to garnishment by a creditor. The learned judge said, "In 1878 the Revised Statutes of the United States were adopted under an act of Congress. By it the act of June 7, 1872, including the provisions of said section 4536, became a part of the Revised Statutes, under title 53, Merchant Seamen, c. 3. This merchant seamen statute is a general and permanent one, dealing with the shipping of seamen, their wages,

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and effects, discharge, protection, relief etc. We find in this statute no distinction or discrimination made between the seamen engaged in merchant ships belonging to the United States as to their protection in the coastwise trade generally and the particular coastwise trade mentioned in the act of June 9, 1874. Is not this fact strongly persuasive that Congress intended to put all seamen engaged in the coastwise trade on the same footing as to their treatment, and their protection in reference to their wages?" But the Revised Statutes were enacted in 1874, and the saving clause of section 5601 seems to have been overlooked. The case of *United States v. The Grace Lothrop*, *supra*, was not referred to and possibly was also overlooked. The learned judge quoted from the act of August 19, 1890, and the fact may have been, though it does not appear in the report, that the libellant in that case, as in *Holland v. Steamship Helene*, *supra*, had been shipped by a shipping commissioner. If such were the fact the conclusion reached may readily be understood, otherwise we are unable to follow it. In the case of *In re Sutherland*, 197 Fed. 841, Judge Toulmin's reasoning received the approval of District Judge Day. The question involved in the *Sutherland case*, however, was somewhat different from that presented in the case at bar. Both Judge Toulmin and Judge Day seemed to take the view that the case of *Wilder v. Inter-Island Steam Navigation Co.* virtually decided that the act of June 9, 1874, did not have the effect which has been ascribed to it. It seems to us that the supreme court made it very clear that it intended to throw out no intimation as to what view it entertained on the point.

Congress has the undoubted power to determine the policy which shall govern the relations between ship-owners and seamen and their creditors. With the logic or wisdom of distinctions drawn or discriminations made by statute, unless they contravene the Constitution, the courts are not concerned, it being their duty merely to construe and apply the law as they find it to have been enacted. We hold that under the federal statutes

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the wages of a seaman engaged in the merchant trade between ports in this Territory, the seaman not having been shipped by a shipping commissioner, may be attached by a creditor in garnishment proceedings.

As the case will have to be remanded we would call attention to section 1831 of the Revised Laws relating to the exemption of wages from attachment and execution, and to section 1 of Act 99 of the Laws of 1907 relating to the garnishment of wages. No reference was made to local statutes at the argument and we make no ruling as to the application of those mentioned or either of them to the wages of the defendant.

The order appealed from is reversed and the case is remanded to the district court of Honolulu for further proceedings conformable hereto.

F. Schnack for plaintiff.

E. W. Sutton (Smith, Warren, Hemenway & Sutton on the brief) for the garnishee.

C. H. McBride filed a brief for defendant.

IN RE ASSESSMENT OF TAXES, KAPIOLANI ESTATE, LIMITED.

APPEAL FROM TAX APPEAL COURT, FIRST TAXATION DIVISION.

ARGUED SEPTEMBER 22, 1913.

DECIDED OCTOBER 8, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

TAXATION—valuations.

Upon the evidence a decision of a tax appeal court is reversed and lower valuations placed upon the property involved.

OPINION OF THE COURT BY PERRY, J.

This is an appeal by the taxpayer from valuations placed by the tax appeal court upon two pieces of land for taxation purposes for the year 1913.

In re Taxes, Kapiolani Estate, 21 Haw. 667.

One of the tracts, known as Uluniu, is situate at Waikiki, mauka of Kalakaua Avenue, and has a frontage of about 968 feet on that highway and an area of 17.786 acres or 781,195 square feet. The land was returned in January, 1913, at a valuation of \$50,000, and was assessed at \$85,400. The valuation fixed by the tax appeal court was \$77,339.62. The assessment for 1910 and 1911 was \$40,000 and for 1912 \$50,000.

The assessor testified that during the three years last past property in the general locality now under consideration had, in his opinion, increased somewhat in value; that that portion of Queen Liliuokalani's land which fronts on Kalakaua Avenue and adjoins on the east the land of the appellant was assessed for 1913 at a valuation of fifteen cents per square foot and the assessment was accepted; that a piece of land opposite the Moana Hotel and near the tract in question and with an area of 7140 square feet was assessed at about twenty cents per square foot and another piece in the same vicinity and with an area of 13,200 square feet was assessed at about twenty-two cents per square foot; and that the assessment of Uluniu was, for the portion fronting on Kalakaua Avenue to a depth of 250 feet, at the rate of fifteen cents per square foot and for the remainder at the rate of \$4000 per acre.

From other evidence in the case it further appeared that a large portion of the front part of the land under consideration is lower than the level of the adjoining street, in places as much as two and one-half feet; that the whole tract is sandy; that the Queen's land is not below the street level and that to some extent at least its sand has been replaced with soil; and that for one month during March and April, 1913, the appellant by public advertisement offered the whole tract for sale, having for the purpose first subdivided the property, with provision for five streets, into eighty-four lots, the one upon which the dwelling-house stood containing an area of 3.595 acres and the others varying in size from 50 ft. x 100 ft. to about 84 ft. x 100 ft. The prices asked varied from thirty cents per square foot, for

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lots fronting on Kalakaua Avenue, to ten cents per square foot and other terms offered were "one-third cash, balance in four years time, first year without interest, balance of term 6% per annum" and that "a lot with a frontage of twenty feet on Kalakaua Avenue, and running to the sea-beach, will be included in the Uluniu tract and all purchasers of lots will have a perpetual right of easement of ingress and egress to the beach." Applications were received for twelve only of the lots and the offer of sale was therefore withdrawn.

Not very far from Uluniu, on the mauka side and to the west, there is much swampy land. Uluniu itself produced no income at the assessment date. The only use for which it seems available at present is for residence purposes.

A real estate expert testified that in his opinion the full cash value of the land on January 1, 1913, was at the rate of \$2500 per acre or \$44,465 for the whole tract. There is no evidence directly supporting a valuation substantially higher. The inability to sell in lots upon the terms offered shows that the prices asked were higher than the salable value. The fact that the owner of adjoining land accepted an assessment of fifteen cents per square foot, while evidence, is not entitled to much weight. The same is true of the accepted assessments of the two small lots opposite the Moana Hotel.

Since hearing the argument in the case we have viewed the premises in question. Upon all the evidence we find that on January 1, 1913, the full cash value of the land of Uluniu was not more than the amount named in the return, to wit, \$50,000.

The other piece of land involved in the case is situate at the northwest corner of Alakea and King streets and has a frontage of 46 feet on King street and 188 feet on Alakea street, with a depth of a little less than 46 feet at the mauka end. A substantial two-story building of stone and brick, completed in the early part of 1903 at a cost of \$65,000, stands upon the land. The property was returned at \$53,400, assessed at \$90,190 and

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valued by the tax appeal court at \$75,190. The assessment for 1910 and 1911 was at \$45,000 and for 1912 at \$53,400.

The assessor's present valuation was arrived at by valuing 2990 square feet on the corner at \$5 per square foot and the remaining 6310 square feet at \$4 per square foot, a total of \$40,190, and the building at \$50,000. The evidence for the Territory was that the land on the other corners of King and Alakea streets is assessed at \$5 per square foot and other land in the neighborhood, on Alakea street, at \$4 per square foot and that the assessments have been accepted; that in January, 1910, land at the corner of Bishop and King streets was sold at \$5.75 per square foot, inclusive of old wooden buildings standing thereon, and land at the corner of Bishop and Merchant streets at \$5 per square foot; that in 1910 land at the southwesterly corner of Merchant and Alakea streets, with a substantial brick building, was sold at the rate of about \$3 per square foot; that land at the southwest corner of Alakea and Hotel streets, 7142 square feet, was recently sold for the sum of \$29,000; and that in June, 1912, 996 square feet of land on the westerly side of Alakea street, between King and Merchant streets, was sold for \$8000. A witness, called by the Territory as an expert on values of real estate, testified that in his opinion the full cash value of the property in question on January 1, 1913, was \$98,150, but since the estimate was confessedly formed without any consideration whatever of the rentals received or of the income-producing capacity of the property it is not persuasive. The following facts also appear from the evidence: that for some time past the owners have been willing to sell the property at the price of \$100,000 payable on favorable terms as to deferred payments; that at a time not stated appellant received an offer of \$100,000 for the property, \$1000 only to be paid in cash, other installments to be paid from time to time until \$40,000 in all was paid, the appellant to remain in possession in the meantime, and the balance of \$60,000 to be secured by mortgage for eight or ten years; that this offer was subsequently

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withdrawn; that in 1912 an offer of \$50,000 cash was made for the property by a person financially responsible and that the offer was refused; that the cellars under the stores are leaky and, in spite of efforts to remedy the difficulty, admit underground water; that for the first three years after its completion the building was without tenants and thereafter was occupied in part only until 1912 when for the first time it was wholly occupied; that the total rentals for the fully occupied building were, on January 1, 1913, at the rate of \$6726 per annum; that five of the stores are under leases expiring respectively in 1914, 1915 (three of them) and February, 1917, and that as to all the other stores and offices the tenancies are at will; and that the annual expenditures are, for the privilege of swinging the shutters of the rear windows over the adjoining land, \$120, for insurance \$562.87, labor \$600, electric lights \$120, water \$50, sewerage \$20 and repairs (estimated) \$120. Taxes at the present rate, on a valuation of \$65,000, would amount to \$724.75, making the total annual expenditures \$2317.62 and leaving a net annual rental, while the whole building is occupied and at the rates prevailing at the last assessment date, of \$4408.38.

The offer of \$100,000 was not for cash and was withdrawn and is therefore without weight as evidence. The income-producing capacity of the property is the most important of the facts disclosed by the evidence which tend to throw light on the full cash value. It is not claimed that on the assessment date the rental value was greater than that shown by the rents actually received at that time. A net annual income of \$4408.38 would be 6 78/100% on an investment of \$65,000. It would be unsafe, however, for an intending purchaser to regard the average net annual income as being as much as \$4408.38, particularly in view of the fact that for so many years the building was, in whole or in part, without tenants. Reasonable allowance should be made for possible periods of partial vacancy and for possible lowering of rents, to say nothing of the fact that

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the appellant's estimate of \$120 per annum for repairs seems to be unduly low.

Upon all the evidence we find that on January 1, 1913, the full cash value of the property was \$65,000.

The appeal from the valuation placed by the tax appeal court on the buildings at Uluniu has been withdrawn.

J. Lightfoot for the taxpayer.

Wade Warren Thayer, Attorney General, for the assessor.

TERRITORY OF HAWAII v. DAVID MATTOON.

RESERVED QUESTIONS FROM CIRCUIT COURT, FOURTH CIRCUIT.

SUBMITTED OCTOBER 9, 1913.

DECIDED OCTOBER 13, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

OFFICERS—*de facto* officer—collateral attack on authority of officer *de facto*.

A public officer who wrongfully but in good faith holds over and continues to exercise the functions of an office after the term for which he was elected or appointed has elapsed, there being no *de jure* incumbent, is a *de facto* officer, and his title or authority cannot be collaterally questioned in proceedings to which he is not a party or which were not instituted to determine their validity.

SAME—*judge de facto*.

Where a judge of a circuit court of this Territory was commissioned by the President with the advice and consent of the Senate of the United States for the term of four years commencing on the 6th day of January 1909, continued, after the 6th day of January 1913, to perform the duties of the office as he had theretofore been doing; no new appointment having been made and there being no other claimant of the office; and the department of justice has continued to recognize the incumbent as such judge; held, that he is at least a *de facto* judge.

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OPINION OF THE COURT BY ROBERTSON, C.J.

On or about August 15th, 1913, the district court of North Hilo held the defendant to answer any charge of forgery which might be preferred against him by the grand jurors for the fourth judicial circuit of the Territory of Hawaii. On September 29th the grand jurors were summoned to attend the fourth circuit court, Hon. Charles F. Parsons, judge, presiding, for the purpose, presumably, of considering with other matters, the accusation against the defendant. On the last mentioned date the defendant appeared and filed an "objection to jurisdiction and challenge to array of grand jury" in which it was alleged and claimed that as Judge Parsons' commission expired on the 6th day of January 1913, and no new appointment had been made, neither Judge Parsons nor any one else was qualified to call or swear a grand jury or to otherwise act as judge of the circuit court of the fourth circuit. It appears that Charles F. Parsons was commissioned on January 6, 1909, by President Roosevelt, with the advice and consent of the Senate of the United States, as judge of said court "for the term of four years, commencing with the date hereof, subject to the provisions of law."

The circuit judge reserved for the consideration of this court the following questions: (1) "Is a grand jury called together by virtue of orders made by Charles F. Parsons subsequent to the sixth day of January, 1913, a duly and legally constituted grand jury with power and authority to investigate into the alleged commission of crimes within the said judicial circuit?"

(2) "Had the said Charles F. Parsons the right, power, authority or jurisdiction at any time since the sixth day of January A. D. 1913, to make any orders as judge of said court?"

The contention of counsel for the defendant is that notwithstanding the decision of the court of claims in the case of *Robinson v. The United States*, 42 Ct. Cl. 52, to the contrary, under the law the power and authority of a circuit judge of this Territory ceases absolutely at the end of the term of four years

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for which he has been commissioned. We are of the opinion, however, that that question is not presented for determination by the record before us, and that it cannot be raised in the manner followed in the case at bar.

Since January 6th last Judge Parsons has continued to perform the functions of circuit judge of the fourth circuit court as he had theretofore been doing; he has not been reappointed, but neither has any one else been appointed to the office, and there is no other claimant for the office; he is still recognized as such judge by the department of justice and receives the salary of the office through the department.

A public officer who wrongfully but in good faith holds over and continues to exercise the functions of an office after the term for which he was elected or appointed, there being no *de jure* incumbent, is a *de facto* officer. *Adams v. The Mississippi State Bank*, 23 So. 395, 398; *Keys v. Keys*, 109 Pac. (Kan.) 985; *Cary v. State*, 76 Ala. 78, 86; *Carli v. Rhener*, 27 Minn. 292; *Petersilea v. Stone*, 119 Mass. 465; *Waite v. Santa Cruz*, 89 Fed. 619, 626.

If the incumbency of Judge Parsons since January 6, has been rightful and by authority of law and the terms of his commission he is a judge *de jure*, and if his incumbency has been without authority of law, merely by color of authority, but in good faith and under the circumstances of general acquiescence above mentioned he is a judge *de facto*. We have no hesitation in holding that Judge Parsons is at least a *de facto* judge.

It is well settled that the acts of a *de facto* officer, so far as the rights of third persons are concerned, done within the scope and apparent authority of the office, are as effective as those of an officer *de jure*, and that the title or authority of an officer *de facto* cannot be collaterally questioned in proceedings to which he is not a party or which were not instituted to determine their validity. *Mechem*, Public Officers, Secs. 328, 330. *In re Manning*, 139 U. S. 504; *McDowell v. United States*, 159 U. S. 596; *Ex parte Henry Ward*, 173 U. S. 452; *Sheehan's Case*,

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122 Mass. 445; *Clark v. Commonwealth*, 29 Pa. St. 129; *Rep. v. Oishi*, 9 Haw. 641, 646. In *Norton v. Shelby County*, 118 U. S. 425, 441, the supreme court said: "The doctrine which gives validity to acts of officers *de facto*, whatever defects there may be in the legality of their appointment or election, is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby. Offices are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices and in apparent possession of their powers and functions. For the good order and peace of society their authority is to be respected and obeyed until in some regular mode prescribed by law their title is investigated and determined. It is manifest that endless confusion would result if in every proceeding before such officers their title could be called in question." In the case of *Territory v. Lockwood*, 3 Wall. 236, it was held that a proceeding in the nature of a *quo warranto*, to test the right of a person to exercise the functions of a judge of the supreme court of one of the Territories, must be in the name of the United States, and not in the name of the Territory. Mr. Justice Swayne, speaking for the court, said: "The judges of the Supreme Court of the Territory of Nebraska are appointed by the President and confirmed by the Senate of the United States. The people of the Territory have no agency in appointing them and no power to remove them. The territorial legislature cannot prescribe conditions for the tenure or loss of the office. Such legislation on their part would be a nullity. Impeachment and conviction by them would be futile as to removal. The right of the Territory to prosecute such an information as this would carry with it the power of amotion without the consent of the government from which the appointment was derived. This the Territory can no more accomplish in one way than in another. The subject is as much beyond the sphere of its authority as it is beyond the authority of the States as to federal officers whose

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duties are to be discharged within their respective limits. The right to institute such proceedings is inherently in the government of the nation." What was there said applies to the circuit judges of this Territory as well as to the justices of the supreme court.

The challenge and objection interposed by the defendant in this case constituted a collateral attack upon the authority of the circuit judge. As shown by the authorities cited such an attack cannot be other than futile. The concrete question in this case, and the one which properly should have been reserved is whether or not the challenge and objection ought to be sustained. The questions reserved, however, are involved in the ultimate question and we deem it not inappropriate to answer them, and they are accordingly answered in the affirmative.

Wade Warren Thayer, Attorney General, and R. W. Breckons for the Territory.

J. W. Russell and C. H. McBride for defendant.

D. L. Withington, R. B. Anderson and E. M. Watson, a committee of the Bar Association, *amici curiae*.

IN RE ASSESSMENT OF TAXES, HUI OF KAHANA.

APPEAL FROM TAX APPEAL COURT, FIRST TAXATION DIVISION.

ARGUED OCTOBER 8, 1913.

DECIDED OCTOBER 16, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

TAXATION—assessments—Hawaiian land huls.

An assessment of taxes to the "Hui of Kahana" is not authorized by statute. In cases of Hawaiian land huls the assessments should be to the individual members upon their respective undivided interests as tenants in common in the lands of the huls.

In re Taxes, Hui of Kahana, 21 Haw. 676.

OPINION OF THE COURT BY PERRY, J.

This is an appeal by the Territory from a decision of the tax appeal court for the first judicial circuit declaring that certain water rights which had been assessed against the "Hui of Kahana" at a valuation of \$400,000 had no taxable value on January 1, 1913.

The "Hui of Kahana" is a Hawaiian hui, of the same general character as other Hawaiian hui which at times have been involved in litigation before this court. Its members are tenants in common of its lands "in proportion to their respective ownerships of shares, so-called." *Pilipo v. Scott*, ante 609, 612. The members have adopted "by-laws" or regulations (a copy of which has not been filed in the case at bar) providing for the choice of officers or other agents and relating, doubtless, to the transaction of the business of the hui. At its formation the number of shares of this hui was 115 but subsequently eleven shares were, in the language of the testimony, "purchased by the hui," leaving 104 shares owned by individuals. In effect the eleven shares were retired, thus reducing the total number of shares to 104. Of the outstanding shares Mrs. Mary E. Foster claims to hold 91 $\frac{491}{720}$ and L. L. McCandless nine, the remainder being held by a few other persons.

The property owned by the "Hui of Kahana," or its members, consisted on the assessment date of the ahupuaa of Kahana containing an area of 5050 acres. After viewing the land the assessor for the purposes of taxation made the following classification and fixed the following valuations: land on or near the beach, 50 acres, @ \$250, \$12,500; wet land, 115 acres, @ \$200, \$23,000; agricultural land, 800 acres, @ \$100, \$80,000; and mountain land, 4085 acres, @ \$1, \$4085,—a total valuation of \$119,585. In addition to this he placed a valuation of \$400,000 upon certain water rights, appurtenant to the ahupuaa of Kahana and referred to in the evidence and argument as the "surplus water" of Kahana, which rights in conjunction with rights of way and other rights, had been, in December,

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1912, leased or agreed to be leased by the hui to the Waiahole Water Company, Limited, for the term of fifty years at an annual rental of \$40,000.

The "Hui of Kahana" filed with the assessor a return, for taxation purposes, of "11 shares in said Hui, being original shares of," naming the original individual owners of the eleven shares and placing a valuation of \$5500 on the property so returned. The assessment of these eleven shares likewise was made against the "Hui of Kahana," the assessor increasing the valuation to \$11,000. The assessor further assessed to the "Hui of Kahana" the water rights already referred to at a valuation of \$400,000. The hui appealed, with the result above stated. Mrs. Foster in her own name returned her 91 491/720 shares and was assessed for the same. At the hearing of the appeal from the assessment against her, both parties seem to have proceeded on the assumption that there was a separate assessment on the so-called "surplus water" of Kahana and that the value of the surplus water should not be considered in arriving at a valuation of the property in which she held the number of shares stated. L. L. McCandless and the other members of the hui also filed returns each in his own name of the shares respectively held by them and assessments were made against them in accordance with their returns but whether with or without an understanding that the surplus water was not included in the assessments does not appear.

Whether under the circumstances a separate assessment upon the water rights would be invalid as against the members of the hui or any of them, either because the water rights were included within the description of the ahupuaa returned by and assessed to them or because the water rights and all other interests or parts of the ahupuaa were still united in ownership, need not be determined in this case. Upon another ground the assessment cannot be sustained. The "Hui of Kahana" as such is not a legal entity. It is neither a corporation nor a partnership. The title to its lands is not in a trustee for its use and benefit

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but is held in undivided interests by the members themselves as tenants in common. The statutory provision that "the interest of any person in any property shall be separately assessed" (with exceptions immaterial to this case) "and every person shall be liable to taxation in respect of the full value of his interest in such property," is applicable. The value of the interest of each member of the hui in the water rights should be assessed, either separately or as a part of the land as the law may require or permit, directly to the member himself.

The assessment against the "Hui of Kahana" was not authorized by statute and for that reason the decision appealed from is sustained.

A. A. Wilder (*Thompson, Wilder, Watson & Lymer* on the brief), for the taxpayer.

A. G. Smith, *Deputy Attorney General* (*Wade Warren Thayer, Attorney General*, with him on the brief), for the assessor.

IN RE ASSESSMENT OF TAXES, WAIHAOLE WATER COMPANY, LIMITED.

APPEAL FROM TAX APPEAL COURT, FIRST TAXATION DIVISION.

ARGUED OCTOBER 8, 1913.

DECIDED OCTOBER 16, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

TAXATION—*exemption—water system.*

Property used in the construction of a water system created in the main for the purpose of supplying water to a cane-planting corporation and only incidentally for the purpose of selling water to the general public is not under Act 136 of the Laws of 1907 exempt from taxation.

Id.—*water rights—separate assessment.*

When by virtue of a conveyance water rights have been severed in ownership from the lands to which they were originally appurtenant, the water rights may be assessed separately for purposes of taxation.

In re Taxes, Waiahole Water Co., Ltd., 21 Haw. 679.

Id.—*valuation—full cash value.*

The fact that two days before the assessment date a taxpayer purchased property for the agreed price of \$257,500 supports a finding that on the assessment date the full cash value of the property was \$250,000.

OPINION OF THE COURT BY PERRY, J.

This is an appeal from a decision of the tax appeal court for the first circuit sustaining an assessment of \$250,000 upon certain property of the appellant. The property assessed consists of water rights formerly appurtenant to the ahupuaas of Waikane and Kahana and to other lands and also rights of way and sites for tunnels, ditches, dams and other works necessary for the development, transportation and use of the water referred to, all of which water rights and other property so assessed were granted and conveyed to the appellant on December 30, 1912, for the consideration of \$257,500 payable \$107,500 upon delivery of the conveyance and the balance in three yearly installments of \$50,000 each. The assessment is contested on the ground that, as it is claimed, the property is under Act 136 of the Laws of 1907 exempt from taxation and on the further ground that on January 1, 1913, the property was of no value.

The statute relied upon provides that "For the term of ten years from and after January 1st, 1908, all property, both real and personal, actually and solely used in the construction, operation, maintenance of any water system, including therein ditches, tunnels, canals, flumes, reservoirs, water gates, dams and all other means of storing and distributing water, existing or established for the purpose of distributing water for sale to the general public for irrigation, agricultural and domestic purposes by any person or persons, corporation or joint stock company, who or which may establish or construct any such system after said first day of January, 1908, shall be exempt from all taxation imposed either by the Territory of Hawaii or any political subdivision thereof." The articles of association show that the Waiahole Water Company, Limited, the present appellant,

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was organized to acquire, develop, store, convey and distribute water for irrigation, to erect all works necessary for the purpose and to sell and otherwise dispose of water; but they contain no indication that it is the intent of the corporation to at all times distribute water for sale *to the general public*. Of the 10,000 shares of the appellant's capital stock 9991 shares are owned by the Oahu Sugar Company, Limited, a corporation operating a large sugar plantation in the district of Ewa on this Island. The testimony of the witnesses advanced on behalf of the appellant is clearly to the effect that tunnels, ditches and other works are now in course of construction for the transportation of the company's waters from the Koolau side of the Island to the district of Ewa; that the Oahu Sugar Company has contracted to take a part of the water for use on its plantation; that one or two other corporations, some of their tenants and numerous other persons along the line of the ditch have already "either tentatively contracted or made overtures for" water from the appellant; that, as the appellant understands its rights and duties, it is not under a legal obligation to supply water to others than the Oahu Sugar Company and that, subject only to any existing contracts, it would be competent for the Oahu Sugar Company at any time to take all the water for its own use,—that, in other words, the Oahu Sugar Company will probably determine from time to time, as a matter of business, how much of the water to use on its own lands and how much, if any, to sell to others.

Under these circumstances it cannot be said that the water - system which is being created by the appellant exists or is being established "for the purpose of distributing water for sale to the general public." The evidence leads irresistibly to the conclusion, on the contrary, that the main purpose of the establishment of the systems is to procure water for the use of the Oahu Sugar Company and that only as an incidental matter will others be supplied. In order to secure the desired exemption it must appear that the property is being "actually and solely

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used" in the construction, operation and maintenance of a water system created to distribute water for sale to the general public. The appellant's property is not at present exempt under the statute referred to.

The court below found that the water rights and other property under consideration were on January 1, 1913, of the full cash value of \$250,000. The evidence shows that on December 30, 1912, only two days prior to the assessment date, the appellant, with full knowledge of the estimated cost, possible difficulties, delays and other circumstances attendant upon the undertaking to transport the water from Koolau to Ewa purchased the water rights and other property involved in this appeal for the sum of \$257,500, payable in the installments above stated. This is sufficient to support the valuation appealed from and there is no evidence requiring or justifying a lower valuation. The contention that the water is of no value because the tunnels and ditches are not completed and the water is still flowing into the sea cannot be sustained. The appellant's own estimate two days before the assessment date was quite to the contrary.

There was no illegality or error in assessing the water rights separately from the ahupuaas and other lands to which they were formerly appurtenant. By act of the parties themselves, the appellant and its grantors, the water rights were severed in ownership from the lands and can no longer be regarded, for purposes of taxation, as appurtenant to the lands. The water rights were certainly not assessed or assessable to the grantors on January 1, 1913, for on that day they were no longer the property of the grantors. Any assessment on that date to the grantors of the lands would include only the grantors' interest in those lands and would not include interests which had been previously conveyed to others. The intent of grantors, grantee and assessor to separate the water rights from the remaining interests in the lands is beyond doubt. There was no duplication of assessments upon the same water rights.

In re Taxes, Waihole Water Co., Ltd., 21 Haw. 679.

The decision appealed from is affirmed.

A. A. Wilder (*Thompson, Wilder, Watson & Lymer* on the brief) for the taxpayer.

Wade Warren-Thayer, *Attorney General*, for the assessor.

JULIA GOMES, BALBINA SANTOS RITA, LUIZA SANTOS, ALEXANDRINA CORDEIRO AND DOMINGAS WHITE *v.* SOCIEDADE LUSITANA BENEFICENTE DE HAWAII AND MARIA PEREIRA.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED OCTOBER 13, 1913.

DECIDED OCTOBER 20, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

MUTUAL BENEFIT INSURANCE—*designation of beneficiary—form of declaration.*

Where the by-laws of a benefit society prescribe a form of declaration to be used by members in disposing of mortuary benefits and provide that members "whenever practicable" shall use the blank forms supplied by the society, and the testimony shows that at the time of making a declaration the member was ill in a hospital at a place distant from Honolulu where the office of the society was located, and that neither the member nor the local agent of the society possessed one of the society's blank forms, the use of a declaration not of such form is permissible.

SAME—*waiver of requirements of by-laws.*

A by-law of a benefit society prescribing the form of declaration to be used by members in designating beneficiaries which is of a directory nature and designed for the protection or convenience of the society may be waived by it, and the acceptance by the society of a declaration irregular in form without notice or objection being given to the declarant will constitute a waiver of the irregularity, at least in a case where it is shown that the use of one of the society's forms was not practicable.

SAME—*effect of unauthorized disposition of portion of fund.*

A valid gift contained in a declaration will not be invalidated

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by reason of the presence of a provision attempting to make an unauthorized disposition of a portion of the fund.

SIGNATURES—*use of mark.*

The making of a cross-mark on a written instrument by an illiterate person is a sufficient signing of the instrument, the mark being intended as a signature.

OPINION OF THE COURT BY ROBERTSON, C.J.

This is an appeal from a decree dismissing a bill of complaint in a suit to establish a lost document and to recover certain moneys alleged to be due thereunder to the complainants. There was little conflict in the evidence. It appears that one Manuel Silva Pereira, a resident, before and at the time of his death in December 1912, of Eleele, Kauai, was a member in good standing of the Sociedade Lusitana Beneficente de Hawaii, an incorporated benefit society, one of the defendants; he was also the husband of the defendant Maria Pereira, and the father of the complainants, the issue of a former marriage. In January 1912, the deceased member being ill at the hospital at Eleele requested one Corvalho, an agent of the society, to prepare for his execution a written declaration disposing of his mortuary benefit as a member of the society; there being no blank form for the purpose immediately available and the decedent being illiterate the agent wrote out a declaration in his own hand and according to the instructions given him; at the suggestion of his wife the decedent decided to set aside \$100 for his funeral expenses and for masses to be said for the repose of his soul, \$700 he directed to be paid to his widow and a like sum to his five daughters, the amount at his disposal being \$1500; the instrument having been executed in the presence of two attesting witnesses, it was sent by the agent to the office of the society at Honolulu; the clerk of the society, under date of January 29, wrote the agent acknowledging receipt of the declaration saying that there was some doubt about it as it was not on one of the forms furnished by the society, but he would submit it to the directors; the matter was brought before the directors at a meet-

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ing held on February 1st the minutes showing that "A testament was presented purporting to be the testament of member Manuel de Silva Pereira, Number 718, but was returned for not being in proper form." The clerk accordingly returned the instrument to the agent, Corvalho, informing him that it was not in form "because it is not signed by him" and that in order to avoid complication later on it had better be made out on one of the society's forms, of which one was enclosed; on receipt of the letter and enclosures Corvalho handed them to another agent of the society with instructions to deliver them to Pereira; the second agent gave them to a messenger for delivery, and the messenger delivered them to Mrs. Pereira; there was no evidence that the papers ever reached the decedent or that he was informed of the action taken by the directors of the society. The testimony was conflicting as to the form of execution of the instrument. The decedent being unable to write had signed by making his mark in the form of a cross at the lower right-hand corner of the instrument while two names said to have been the signatures of the witnesses appeared at the lower left-hand corner. Corvalho testified that at the place where the decedent had made the cross-mark he had written the words "his mark," and that above the signatures of the witnesses were the words "witnessed and signed in presence of." This was denied by the society's clerk and two of the directors, and it was admitted that if the other directors should be called as witnesses they would testify to the same effect. We assume that the words said to have been written at the lower part of the declaration as above stated were not there.

The circuit judge held that the declaration had not been executed by the member nor attested by the witnesses in the manner required by the by-laws of the society, and that it was invalid and of no effect. Counsel for the defendants contend that the decree should be affirmed for the reasons given by the circuit judge, and upon the additional grounds that the assignment of \$100 for funeral expenses and masses for the repose

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of the soul, being a purpose not specifically permitted by the by-laws, was enough to invalidate the whole declaration, and that the failure to use a blank declaration form furnished by the society also rendered the alleged declaration invalid. They cite the case of *Monizi v. Santo Antonio Society*, ante, p. 591. In that case it was held that the right of a member of a benefit society to designate a beneficiary of a mortuary benefit may, generally speaking, be exercised only in accordance with the provisions of the society's by-laws, and that the retention of a will by the society did not estop it from setting up the invalidity of a disposition contained in it because the making of a declaration in that manner was expressly prohibited by the by-laws. The rule that a benefit society may voluntarily waive provisions contained in its by-laws where those provisions were designed for the benefit or protection of the society itself was there recognized. An important difference between that case and this consists in the fact that there the member acted in defiance of the society's by-laws whereas in the case at bar there was a bona-fide attempt to act in accordance with the by-laws. Aside from the question of the effect of the attempted gift of \$100 for the purposes stated which all parties concede to have been unauthorized by the by-laws, the case presents a matter of irregularity in the declaration, and the question is whether it was such as could have been and was in fact waived by the society.

Assuming that because the declaration was irregular in form the directors of the society were within their rights in refusing to receive and file it, it is clear that such refusal did not affect the decedent since he was not notified of it. The returning of the declaration to the society's agent and its delivery to Mrs. Pereira was ineffective, and the rights of the parties must be determined as though the declaration had been received by the society without objection.

According to the by-laws of the society the fund in dispute would be payable to the member's widow in the absence of a written declaration making a different disposition. In any

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event one-half of the fund is payable to the widow and the by-laws permit the giving of not more than one-half to the daughters. Article 11 of the by-laws contains the provision that "The society will not accept or acknowledge the validity of any provision or provisions in any documents disposing of the death benefit or part thereof excepting the declaration be properly filled out in accordance with the by-laws and filed at the society's office during the member's life." Article 27, provides "When a member desires to make his 'will' declaration concerning the disposition to be made of the death benefit must whenever practicable request of the society's secretary a blank in the form hereunder indicated." Then follows a form of declaration containing spaces for the names of the beneficiaries, and concluding with attestation clauses for the declarant and witnesses as follows: "In witness whereof I sign this declaration at..... this.....day ofin the presence of the witness hereunder," and, "We, the undersigned, testify thatresiding at.....on the above date, in our presence, signed this declaration affirming the same to be his free act." We think the testimony made a sufficient showing that it was not "practicable" to use one of the society's blanks. The member was ill in the hospital and as testified to was in a "very bad" condition and neither he nor the agent were possessed of a blank form. Neither the letter nor the spirit of the by-law required that he should wait until a blank could be secured from the office of the society at Honolulu.

The making of a mark by the declarant was a sufficient signing of the declaration it having been intended as a signature. *Zacharie v. Franklin*, 12 Pet. 151, 160; *Iowa L. & T. Co. v. Greenman*, 63 Neb. 268; *Jackson v. Tribble*, 47 So. (Ala.) 310; *Willoughby v. Moulton*, 47 N. H. 205. The form of a declaration is of secondary importance to its substance when the intent of the declarant has been made clear, and the by-laws prescribing the form of declaration to be used may well be regarded as directory at least in a case where a prepared form was not

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available to the declarant. The authorities hold that provisions in the by-laws of a benefit society which are directory in character and intended merely for its own protection or convenience may be waived by it. *Splawn v. Chew*, 60 Tex. 532, 537; *Manning v. A. O. U. W.* 86 Ky. 136; *Kimball v. Lester*, 59 N. Y. S. 540; *Police Relief Assn. v. Tierney*, 116 Mo. App. 447, 464; *Schardt v. Schardt*, 100 Tenn. 276. Also that such action on the part of the society as the receiving and retaining without objection of a declaration irregular in form will be held to constitute a waiver by it of the irregularity. *Allison v. Stevenson*, 64 N. Y. S. 481; *Kepler v. Supreme Lodge*, 45 Hun 274, 278; *Hanson v. Minnesota Relief Assn.* 59 Minn. 123; *Adams v. A. O. U. W.* 105 Cal. 321, 326. We hold that the defendant society, in not notifying the decedent that his declaration was not in proper form and would not be received, waived the irregularity as to the attestation of the instrument.

The remaining point is as to the \$100 item. It is to be noted that the society did not object to the declaration on the ground that it purported to make an unauthorized designation of a portion of the fund, but we are not required in this case to decide what disposition the law requires to be made of that item. We are satisfied, and so hold, that the presence of that item in the declaration did not invalidate it in its entirety, and also that it in no way affected the gift to the daughters which was otherwise valid. That is to say, a valid gift contained in such a declaration will not be rendered inoperative by reason of the presence of a provision attempting to make an unauthorized disposition of a portion of the fund.

The decree appealed from is reversed and the case is remanded to the circuit judge with instructions to enter a decree granting the complainants the relief which we hold them to be entitled to.

R. P. Quarles (*Andrews & Quarles* on the brief) for appellants.

E. A. Douthitt (*Douthitt & Coke* on the brief) for appellees.

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H. H. FOSTER AND EDWARD ROSS *v.* HONOLULU CONSTRUCTION AND DRAYING COMPANY, LIMITED, A CORPORATION, J. W. CALDWELL, SUPERINTENDENT OF PUBLIC WORKS OF THE TERRITORY OF HAWAII, AND J. H. FISHER, AUDITOR OF THE TERRITORY OF HAWAII.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED OCTOBER 10, 1913.

DECIDED OCTOBER 21, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

OFFICERS—call for proposals to perform public work—requirements as to proposals.

The superintendent of public works having called for sealed tenders or proposals to perform certain work, and having required bidders to submit both a unit and a total bid on each item of work to be done, or material to be furnished, a bidder filed a proposal to perform the work and furnish the material, in which proposal there were, among others, two items, which, in effect read: 455 lineal feet of concrete pipe at ten cents per foot, total \$455; 122 lineal feet of masonry wall at seventy-five cents per foot, total, \$915; which proposal the superintendent of public works rejected. Held, that the proposal did not comply with the requirements, in that the unit and total bids did not correspond, and it being uncertain which the bidder intended as the correct bid—the unit bid or the total bid,—the proposal was properly rejected.

OPINION OF THE COURT BY DE BOLT, J.

(Perry, J., Dissenting)

The complainants, H. H. Foster and Edward Ross, filed their bill in equity praying for an injunction to restrain the superintendent of public works from signing or approving any vouchers for work done, or material furnished under a certain contract with the respondent, Honolulu Construction and Draying Company, Limited (hereinafter called the "Construction Co."), for constructing certain streets and laying storm drains in the Auwaiolimu tract in Honolulu, and to restrain the auditor

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from issuing any warrants in payment of any work done, or material furnished under the contract, and to restrain the Construction Co. from receiving any money under the contract.

The averments of the bill, so far as they are material in the consideration of the questions presented, are, that the complainants are citizens and taxpayers of the Territory; that they instituted this suit as such citizens and taxpayers for themselves and on behalf of all other taxpayers of the Territory; that the superintendent of public works duly advertised for "sealed tenders" for constructing the streets and laying the storm drains mentioned, thereby giving notice that "plans, specifications and blank forms of proposals are on file in" his office, and that he "reserves the right to reject any or all tenders;" that in response to the advertisement thus made five contractors, including the complainants and the Construction Co., filed in the office of the superintendent of public works their respective bids or proposals for performing the work and furnishing the material required by the plans and specifications; that copies of the plans, specifications and blank forms for proposals are annexed to the bill and made a part thereof.

In the blank forms for proposals to perform the work and furnish material there are five columns for bids, one of which forms, as filled out by the complainants respecting the unit prices and total sums bid, and which they filed as their proposal, reads:

"The following are unit prices for the items named in place complete with the gross sum for which the work specified will be performed:

Item No.	Approximate Quantities	Items	Unit Bid	Total
1		Clearing		\$ 300.00
2	24,848 cu. yds.	Excavating	at 60 cents	\$14,908.80
3	1,338 cu. yds.	Rubble Masonry Wall	at \$5.00	\$ 6,690.00
4	23,435 sq. yds.	Crowning Roadway	at .05 cents	\$ 1,171.75
5	1,842 lin. ft.	Guard Wall	at 75 cents	\$ 1,381.50
6	455 lin. ft.	(12" Concrete Pipe Line complete in place)	at 10 cents	\$ 455.00

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7	7	Brick Inlets, complete in place	at \$35.00	\$ 245.00
8	122 lin. ft.	Rubble Masonry Guard Wall for intersecting streets	at 75 cents	\$ 915.00
Total for which work will be performed				\$26,067.05"

The complainants agreed to complete the work in 150 working days after official notice of the award. The proposal of the Construction Co. was in due form and regular in all respects. The total for which it proposed to perform the work being \$26,745.20, and to complete the work in 140 working days after official notice of the award. There being ten days difference in the time within which the complainants and the Construction Co. respectively agreed to complete the work, the superintendent of public works under the specifications hereinafter noted, was authorized to add to the complainants' bid the sum of \$100, thus making the total amount of their bid \$26,167.05.

The superintendent of public works finding the bid of the complainants "irregular," and acting upon the opinion of the attorney-general of the Territory, rejected it and awarded the contract for the work and material in question to the Construction Co., the next lowest bidder but one whose proposal was also rejected, having failed to name any unit bid whatsoever.

The following provisions of the specifications are deemed pertinent:

"The estimated quantities on these plans and specifications are made for the convenience of the contractor and the Department of Public Works does not assume any responsibility as to the exactness of the same. The contractor will name a lump sum bid for the total work and it will be assumed that his bid is based on a thorough knowledge of the existing conditions and the amount and kind of work to be performed.

"All tenders shall be on blank forms furnished by the Department of Public Works; all terms and conditions of which are made a part hereof.

"The Superintendent of Public Works reserves the right to increase or diminish the work as shown on plans and described

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in these specifications; and in such cases shall add to or deduct from the contract price, as the case may be, the value of such additions or deductions, based on the schedule filed with the contractor's tender, or on the unit price in tender.

"The Superintendent of Public Works in determining who is the lowest bidder under these specifications, will consider the difference in time as proposed for the completion of the work by the contractor at the rate of \$10.00 per day."

There is no allegation of fraud or abuse of discretion.

The bill prayed for a temporary injunction pending proof and for a perpetual injunction on final hearing. The circuit judge declined to grant the temporary injunction as prayed for, but made an order directing the respondents to appear and show cause, if any they had, why a temporary injunction should not be granted. In compliance with this order the respondents made their so-called returns, which, in effect, were demurrers to the bill, and were so treated by court and counsel. The returns were held to be a complete showing on the part of the respondents to the order to show cause, and a decree was thereupon entered dismissing the bill. From this decree the complainants appeal. The case, therefore, is before the court on the pleadings, no evidence having been adduced.

The superintendent of public works, as will be observed, required the bidders to submit both a unit bid and a total bid on each item of work to be done, or material to be furnished. This was not only a reasonable and proper requirement, but, under certain contingencies which it is not unreasonable to assume might arise, was a requirement of considerable importance. For instance, had the proposal been accepted, assuming for the moment that a contract could be founded upon it, and the superintendent of public works had wished to exercise his right under the specifications to either increase or diminish the work; an important question would then have arisen, namely, Shall the value of such addition to or deduction from the work be based upon the unit bid or upon the total bid? Obviously, assuming the total bids to be correct, if a deduction were to be

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made in the proposed work it would be to the advantage of the bidder to base the value of such deduction as regards items 6 and 8, upon the unit bids, and, likewise, it would be to the advantage of the Territory to base the value upon the unit bids if an increase in the work should be made. With correct unit bids this question could not arise.

The proposal upon its face presents a question of doubt and uncertainty, both as to the unit bid and the total bid on each of the items mentioned. The question is not merely technical, but it is one of substance. Taking item 6; it is uncertain whether the complainants intended to bid on the 455 lineal feet of pipe drain at the rate of ten cents per foot, making a total of \$45.50, or one dollar per foot, making a total of \$455. And as to item 8 the same uncertainty exists. Whether the complainants intended to bid on the 122 lineal feet of wall at the rate of seventy-five cents per foot, making a total of \$91.50, or \$7.50 per foot, making a total of \$915, cannot be determined from the proposal before the court. Hence, it is clear that the proposal did not comply with the requirements of the call for tenders. Act 62, Laws of 1909, provides that "All bids which do not comply with the requirements of the call for tenders shall be rejected."

There can be no legitimate question, either as to the authority, or as to the propriety, of the superintendent of public works in requiring each bidder to submit both a unit bid and a total bid on each item of the work to be performed or material to be furnished. It was clearly within his powers to hold as he did that the requirements as to the unit and total bids had not been complied with by the complainants in their proposal as to items 3 and 8, and to reject their bid. *Lord v. Supt. Pub. Works*, 16 Haw. 437, 441; *In re Marsh*, 83 N. Y. 431, 435; *Weed v. Beach*, 56 How. Pr. 470; *State v. N. Y. Co. Comrs.*, 13 Neb. 57.

Counsel for the complainants are not in accord as to the unit bids in question. While one of them contends that there is no error in this regard, the other contends that the unit bids

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of ten cents and seventy-five cents as stated in the proposal are palpable errors and that it is within the power of the court to read into the proposal what he terms the correct unit bids, namely, one dollar as to item 6 and \$7.50 as to item 8. These conflicting views of counsel, however, tend rather to increase the uncertainty. I doubt the propriety as well as the power of the court to undertake to correct the proposal at this time. Reading into a proposal new or additional terms is quite a different proposition from that of construing a contract. This distinction as between a mere proposal and a contract clearly distinguishes the authorities cited by counsel upon this question from the case at bar. To permit a substantial change in a proposal of the character in question, after the other bids have been opened and made public, would be contrary to public policy, and would tend to open the door to fraudulent and corrupt practices.

The proposal, however viewed, presents a question of doubt and uncertainty as to the bidder's intention. Doubt or uncertainty is incompatible with agreement. To result in a contract, the offer must be certain. No contract can be founded upon uncertainty; and if a contract could not be founded upon the proposal in question because of its uncertainty (9 Cyc. 249), it follows that the proposal was properly rejected. If the proposal, either as to the unit bid, or as to the total bid, is not what the complainants intended, obviously, an acceptance of it in that form would not satisfy the law as to the essential elements of a contract. *Moffett, Hodgkins & Co. v. Rochester*, 178 U. S. 373. Such a proposal and acceptance thereof would be lacking in mutuality. It would be a mutual mistake. If, to illustrate a mutual mistake, the owner of a horse offers it to an intending purchaser for \$165, and the latter, understanding the price to be \$65, takes the horse, the minds of the parties do not meet, there is no sale, and the title does not pass. *Rupley v. Daggett*, 74 Ill. 351.

The decree appealed from is affirmed.

J. Lightfoot and E. C. Peters for complainants.

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A. L. Castle and J. W. Cathcart (*Castle & Withington* on the brief) for the Construction Co.

Wade Warren Thayer, *Attorney General*, for the Superintendent of Public Works and Auditor of the Territory.

CONCURRING OPINION OF ROBERTSON, C.J.

I concur in the conclusion that the decree should be affirmed. I do not agree with the contention made by counsel for the appellees that the rejection of appellants' bid is to be upheld on the ground that its rejection was a matter within the reasonable discretion of the superintendent of public works. It seems to me that in deciding whether a tender conforms to the terms and conditions of the proposal the officer's discretion is confined to very narrow limits. If the requirements are not unreasonable they must be met, and the statute provides that all bids which do not comply with the requirements of the call for tenders shall be rejected. I doubt whether the awarding officer is given discretion to waive non-compliance with such reasonable requirements as have been imposed.

The requirement that bidders should give a "unit bid" in addition to stating the total amount for which they would do the work or furnish the materials on each item may well be regarded as a reasonable one upon either of the theories discussed. Unfortunately the purpose and effect of the requirement in this case are obscured somewhat by a clause in the specifications reading as follows: "The superintendent of public works reserves the right to increase or diminish the work as shown on plans described in these specifications and in such cases shall add to or deduct from the contract price, as the case may be, the value of such additions or deductions, *based on the schedule filed with the contractor's tender, or on the unit price in tender.*" This has opened the way for the contention that the "unit bid" column has no necessary connection with the "total" column, but has reference entirely to the price at which additional material will be furnished or extra work performed and deductions

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from the estimated amounts of work and material would be figured. In my judgment the "unit bid" was intended as nothing else than the rate at which the separate items of work to be performed or materials to be furnished were estimated, the "total" column showing the aggregate of each item. The circumstances go to show that it was so understood by all the bidders except perhaps one who made no use whatever of the "unit bid" column.

Counsel for the appellants, while making the contention above referred to, concede that the appellants did not intend their unit bids to be taken as an independent tender applicable solely to additions to or deductions from the estimated quantities of work or material. In their brief they say, "Here it is apparent that the complainants in making up the bid erroneously computed as to unit of value one-tenth of what the figures actually disclosed. We do not presume to say how the mistake was made; perhaps it resulted from erroneous computation by the decimal system. But it is nevertheless apparent from the complainants' bid, as well as all the other bids in the case, that the unit of value was figured by dividing the sum bid as to each item by the quantity of that item, and that all the bidders interpreted the unit of value to be secured by that method of computation. It is equally obvious that the unit of value set forth in the items in dispute are each one-tenth of what the figures should actually disclose." And again, "It is obvious that the computation of the unit of value depends entirely upon the estimated quantity and the lump sum bid for that quantity. And that computation alone controlled. Any other method of computation would lead to an absurdity. Hence, upon any question of deduction the actual proof of computation would arise from the estimated quantity computed against the lump sum bid and not a palpable erroneous computation would be the measure of deduction."

These statements of counsel sufficiently demonstrate the utter futility and impropriety of trying to fit the other theory as to

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the purpose and intent of the "unit bid" column to the case at bar. Even if the above quoted clause of the specifications may be open to the view suggested it should not be so construed in a case where it appears that the parties did not so understand it.

The argument of counsel for the appellants in urging a reversal of the decree concludes with the contention that their unit bids upon items 6 and 8 being palpably erroneous should have been corrected by the superintendent of public works, or should now be read by this court in what counsel claim to be the proper light. I am unable to follow counsel in this. It was not for the awarding officer to say that the amount stated in the "total" column disclosed the rate on which the appellants based their offer and that that given by them in the "unit" column did not, or to decide that the mistake was made in one column rather than the other. Had the superintendent attempted to reconcile the figures he would probably have concluded that as to item 3 the error occurred in the "total" column as, judging from the rates given in the other bids on that item (varying from \$1 to \$1.50 per foot), it was likely that the rate intended by this tender was seventy-five cents per foot instead of \$7.50. But such a change would have reduced the total lump sum bid by a substantial amount, and I think it cannot seriously be claimed that the superintendent had authority to go that far. This is not a case of an obviously mistaken or inaccurate use of a word as disclosed by the context which would permit of rectification by the application of construction. In my opinion it is a case where the disadvantage flowing from a blunder must necessarily rest with the party who committed it. The tender was ambiguous and indefinite and could not have been accepted.

DISSENTING OPINION OF PERRY, J.

The majority opinions proceed upon the theory that the specifications and the tenders contemplate that the so-called "unit bid" or "unit price" must with reference to every item of work bid on, such as "excavating" and "crowning roadway,"

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necessarily be at the same rate as would result from dividing the gross sum bid for each item by the estimated quantity of work or material set forth in the schedule. I do not so understand the specifications and the tenders. As I construe those documents the sole purpose of the "unit bid" is to state an agreed price at which any increase or reduction in the work, which may be ordered by the superintendent under the power expressly reserved to him, is to be paid or allowed for. There is no requirement, express or inferential, that any such increase or reduction is to be compensated at the same rate bid for the work described in the plans and specifications. A bidder after thoroughly familiarizing himself with the physical conditions along and adjacent to the line of the proposed roadways and storm drains, the amount of funds available and of the appropriation and the other circumstances surrounding the making of the improvements might well feel reasonably confident that only insignificant additions at most could be prescribed by the superintendent and that practically no reductions would be ordered and might therefore deem it safe and advisable to name in the "unit bid" column a lower rate than that offered for the main work. Again, the superintendent makes it extremely clear in the specifications that the quantities mentioned in the first column are approximate only and that bidders must visit the localities involved, make their own measurements and assume all the risks as to quantities of material and labor required. A bidder finding on the ground larger cuts or fills than are disclosed by the plans and specifications would naturally name in the last column higher sums than would seem to be justified by the estimated quantities named by the superintendent in the schedule and the rates named in the "unit bid" column for the purpose of increases or reductions.

Under this construction of the specifications and the tenders there is no uncertainty in the complainants' tender and the award of the contract to the Construction Company was unauthorized and should be set aside.

Boeynaems v. Ah Leong, 21 Haw. 699.

RIGHT REVEREND LIBERT HUBERT BOEYNAEMS,
BISHOP OF ZEUGMA, VICAR APOSTOLIC OF HA-
WAI, AS TRUSTEE, v. L. AH LEONG.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

ARGUED OCTOBER 22, 1913.

DECIDED OCTOBER 28, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

COURTS—*stare decisis*.

The court declines to reconsider the questions decided in *Naha-olehua v. Heen*, 20 Haw. 372 and 613, nothing new or different having been advanced in the way either of argument or authorities and the court being satisfied that the conclusion reached in that case was correct.

OPINION OF THE COURT BY DE BOLT, J.

This is a writ of error to the circuit court of the first circuit to review a judgment entered in a statutory action to quiet title to certain parcels of land situate at Kamakela, in Honolulu, being a portion of the land described in R. P. 1985, L. C. A. 245, wherein the Right Reverend Libert Hubert Boeynaems, Bishop of Zeugma, Vicar Apostolic of Hawaii, as trustee (the plaintiff in error), was plaintiff and L. Ah Leong (the defendant in error), was defendant.

The complaint filed in the action alleges, *inter alia*, that the plaintiff is entitled to the lands in controversy in fee simple and is in possession through *cestuis que trust*, and that the defendant claims an undivided one-half interest therein. The answer filed by the defendant denies generally all the allegations contained in the complaint, except that he admits that he claims an undivided one-half interest in said lands.

The cause, jury waived, was heard and submitted on stipulated facts, the decision of the court being in favor of the defendant, whereupon it was "adjudged that the defendant is the owner in fee of an undivided one-half of all and singular

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the lands, tenements and hereditaments described in said stipulation and is entitled to the immediate possession of said undivided one-half thereof."

The stipulated facts are, in substance, the same as those in the case of *Nahaolelua v. Heen*, 20 Haw. 372 and 613. The parties in that case claimed title to the land then in controversy, as the parties in the case at bar now claim title to the lands in controversy, under Elizabeth Kahele St. John Huakini. The contention of the plaintiff in the present case is also the same as that made by the defendant in *Nahaolelua v. Heen*, *supra*, namely, that Mrs. Huakini, by a certain deed executed September 13, 1873, acquired an estate in fee simple, or the power, as against "the heirs of her body," to dispose of the lands therein described (which included the lands now in controversy), in fee simple.

The assignments in error are thirteen in number and present, in effect, the same questions of law as were argued and determined in *Nahaolelua v. Heen*, *supra*, and counsel for the plaintiff in the case at bar, practically upon the same arguments made in the case alluded to, now ask the court to overrule the decisions rendered in that case and reverse the judgment in the case now before us. The arguments of counsel in the case referred to received careful consideration, and as nothing new or different has been advanced in the way either of argument or authorities we decline to reconsider the matter. We are satisfied that the conclusion reached in the former case on each question presented, was correct, and, therefore, decisive and controlling in the case at bar.

The judgment of the circuit court is affirmed.

J. A. Magoon (*N. W. Aluli* with him on the brief) for plaintiff in error.

A. S. Humphreys for defendant in error.

Wilder v. Colburn, 21 Haw. 701.

CHARLES T. WILDER, TAX ASSESSOR, v. JOHN F. COLBURN.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

ARGUED OCTOBER 9, 1913.

DECIDED OCTOBER 30, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

OFFICERS—de facto judge—collateral attack upon authority.

Where a justice of the supreme court of this Territory, after the expiration of the term for which he was appointed, in good faith continues to act as a member of the court and to perform the duties of the office, and does so with the acquiescence of the department of justice, the other members of the court, the bar, and litigants, and no new appointment has been made and no other person claims the office, he is at least a *de facto* judge and his authority is not open to attack in a collateral proceeding.

COURTS—stare decisis—practice.

Where a question of practice arising under statute has once been definitely decided it should and generally will be regarded as settled.

TAXATION—authority of assessor—action on judgment.

Under section 1193 of the Revised Laws a tax assessor has authority to maintain an action upon a judgment obtained by his predecessor in office against a delinquent taxpayer.

CONSTITUTIONAL LAW—due process of law—assessment of taxes.

A statute which requires persons to make returns to the assessor of their taxable property upon notice so to do and provides that in case any person so notified shall refuse or neglect to file a return of his property the assessor may make an assessment thereon according to the best information within his reach which assessment shall be binding and conclusive upon all parties and shall not be subject to appeal, is not lacking in due process of law in so far as it affects one whose failure to make a return was due to contumacy or negligence.

OPINION OF THE COURT BY ROBERTSON, C.J.

The tax assessor for the first taxation division brought action and recovered judgment against the plaintiff-in-error upon a declaration containing four counts. The first count was upon

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a judgment alleged to have been recovered against the plaintiff-in-error by the predecessor in office of the present assessor. The second, third and fourth counts were for property taxes, personal taxes and income taxes respectively all of which were alleged to be due and unpaid. The plaintiff-in-error admits that judgment against him was properly had under the third and fourth counts but claims error as to the first and second.

Before the case was reached for argument in this court the plaintiff-in-error interposed an objection to Mr. Justice Perry sitting as a member of the court, the ground of objection being "that the appointment and commission of said Honorable Antonio Perry, as a Justice of this Honorable Court, expired, and became null and void on or about the 10th day of May, A. D. 1913, and that since said last mentioned date, said Honorable Antonio Perry has not been, and is not now, duly or legally qualified or entitled to sit or officiate as an Associate Justice, or as a member of this Honorable Court."

Justice Perry was commissioned on the 6th day of May 1909, by President Taft with the advice and consent of the Senate of the United States "for the term of four years commencing with the date hereof, subject to the provisions of law." Since May 6, 1913, he has in good faith continued to act as one of the members of this court and to perform the duties of the office as he had theretofore done. This has been with the acquiescence of the department of justice, the other members of this court, the bar, and litigants. No new appointment has been made and no other person claims the office.

After argument upon the objection it was dismissed. We held that Justice Perry is at least a *de facto* judge and that his authority could not be questioned collaterally in the manner attempted in this case. *Territory v. Mattoon*, ante, p. 672.

The defendant demurred to the complaint upon the ground, among others, of a misjoinder of causes of action in that an action based upon a judgment as sought to be set forth in the

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first count was joined with counts for claims for unpaid taxes as set forth in the other counts.

In the case of *Harrison v. Magoon*, 13 Haw. 339, 358, it was held that an action on a judgment is, within the meaning of our statute (Civ. Laws, Sec. 1259; R. L. Sec. 1743), an action *ex contractu* on the promise, or contract implied by law to pay the amount of the judgment, and that a count upon a judgment may be joined with another upon contract express or implied. The plaintiff-in-error contends that a judgment is in no proper sense a contract or agreement between the parties, and claims that the case cited was wrongly decided. We are not disposed to consider the contention on its merits. The point presented is one of mere practice under the statute which should be regarded as settled, and we adhere to the ruling made in that case. A question of this kind having once been definitely decided, should and generally will be regarded as settled. 11 Cyc. 748; *Mosher v. Huwaldt*, 86 Neb. 686. In taking this position we are not to be understood as intimating that that ruling was not well founded.

One of the assignments of error raises the question whether the present assessor may maintain an action upon a judgment recovered against a delinquent taxpayer by his predecessor in office. Counsel for the plaintiff-in-error contends that there is no statutory authority for the proceeding and that as the rights of the assessor in the premises depend wholly upon statute the assessor cannot recover upon the first count. Section 1193 of the Revised Laws provides that "The successor of any assessor shall be invested with the same powers and be subject to the same duties and liabilities as his predecessor, and shall collect all taxes then unpaid, and shall carry on any proceedings commenced by his predecessor."

"Proceeding" in its general acceptation means "the form in which actions are to be brought and defended, the manner of intervening in suits, of conducting them, of opposing judgments and of executing" judgments. Bouv. Law. Dict.; *Erwin v.*

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United States, 37 Fed. 470, 488; *Howell Lumber Co. v. New Brunswick*, 75 Atl. (N. J.) 750. The word is often used in a sense broader and less technical than "action." *In re McFarland's Estate*, 10 Mont. 445, 455; *Mars v. Mining Co.*, 7 S. D. 605, 617; *In re Tillery*, 43 Kan. 188, 192. In *Maile v. Tax Assessor*, 18 Haw. 307, 311, the section quoted was held to authorize a tax assessor to take out an alias execution upon a judgment obtained by his predecessor in office. An action upon a judgment cannot be regarded as a continuation of the action in which the judgment was recovered. It is a new and distinct action. But with reference to the statute is it to be regarded as a new and different proceeding? The statute was designed among other things to enable assessors to carry on to their ultimate conclusion actions and proceedings for the recovery of unpaid taxes which were commenced by a predecessor. To this end a liberal construction of the language used is warranted. An action to recover unpaid taxes is a proceeding having for its object the collection of the amount due from the delinquent taxpayer and its payment into the public treasury. This object is not accomplished by the mere entry of a judgment. In a broad but unstrained sense the proceeding is not ended until satisfaction of the judgment has been obtained. Hence it is that an assessor may take out an execution upon a judgment secured by his predecessor, and hence it is, as we believe, the statute authorizes the maintenance of an action upon a judgment in the manner followed in the case at bar. Otherwise stated, the prior judgment not having been satisfied the proceeding is to be regarded as unfinished and the action upon that judgment as the carrying on of the proceeding in which it was obtained. The conclusion may appropriately be made to rest upon another ground. If, as will hardly be disputed, the assessor who obtained the judgment might, were he still in office, maintain an action upon that judgment, then the present assessor to whom the statute has given the "same powers" may likewise maintain such action.

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The contention is also made under certain of the assignments of error that the system established for the assessment and collection of property taxes in this jurisdiction was so defective from a constitutional standpoint that no proceeding for the collection of assessed taxes may be maintained. The taxes for which claim was made under the second count were assessed against the defendant in the years 1893 and 1905 to 1908 inclusive. The judgment set up in the first count was alleged to have been recovered in 1905. The point sought to be made appears to be this: That prior to 1909, when the statute was amended, it was provided by section 1235 of the Revised Laws that in case any person should refuse or neglect to make a return of his property for taxation as required by law, or decline to take oath to the accuracy of his return, "the assessor may make such assessment according to the best information within his reach, and the same shall be binding and conclusive upon all parties, and shall not be subject to appeal." It has been held that the assessor may not act arbitrarily or capriciously, *In re Taxes, Bishop Estate*, 13 Haw. 671, 675; but that questions of valuation, the assessment having been properly made, are foreclosed when no return has been made, *In re Assessment of Taxes, Lam Wo Sing*, 15 Haw. 60; that the assessment of a whole tract of land to one who owned all but a small piece of it was valid, no return having been made, *Shaw v. Booth*, 14 Haw. 117; also that the taxpayer may show the illegality of an assessment upon property even though he made no return of the property, *Hilo Sugar Co. v. Tucker*, 8 Haw. 148.

Section 1242 of the Revised Laws, as it stood prior to its amendment in 1911, provided that "Each assessor shall at any time add to his assessment or tax list, any person or property heretofore omitted; notice thereof shall be given to the owner, known, within ten days after such addition, " etc. This court has never been called upon to construe that section of the law, and its effect is not involved here.

It is argued that section 1235 authorizes and contemplates

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the taking of private property without due process of law, and that the invalidity of the statute in this respect is such as to destroy the entire law with respect to property taxation.

The authority mainly relied on by counsel for the plaintiff-in-error is the case of *Central of Georgia Railway v. Wright*, 207 U. S. 127. In that case certain shares of corporate stock owned by the plaintiff-in-error had not been assessed to it upon the understanding which appears to have been entertained by both the state officials and the railway company that they were not taxable; eventually the supreme court of the United States held that such shares were taxable; thereupon the comptroller-general of Georgia, after calling the attention of the president of the railway company to the decision of the supreme court and asking for data with reference to the value of the stock in question, and after receiving certain information in reply, assessed the company upon the stock according to the best information obtainable as to its value. The suit was to enjoin the collection of the tax so assessed. In its opinion the court pointed out that the statute of Georgia provided that in cases of failure to make return of taxable property the comptroller-general shall make an assessment from the best information he can procure which assessment shall be conclusive upon the taxpayer and an execution may at once be had for the amount of the tax together with the costs and penalties; also that the supreme court of Georgia had held that when a person fails to make a return in whole or in part he becomes a defaulter, whether he acted fraudulently or through honest mistake and in the utmost good faith, and the opportunity is closed to him so far as adjusting the assessment is concerned. The supreme court held that the procedure did not constitute due process of law. But the facts in that case differed from those in this and the question discussed and decided by the court in that case was a different one from that presented here, as the following excerpts from the opinion will show. The court said, "In view of this statute as thus construed the question made is, whether

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due process of law is afforded where a taxpayer, without fraudulent intent and upon reasonable grounds withholds property from tax returns with an honest belief that it is not taxable, and the assessing officer proceeds to assess the omitted property without opportunity to the taxpayer to be heard upon the validity of the tax or the amount of the assessment, either in the tax proceedings or afterward upon a suit to collect taxes, or by independent suit to enjoin their collection." 207 U. S. 136. "The record discloses that for many years this class of property was not regarded as taxable in Georgia, and was not returned for taxation in the State. But it is contended that the taxpayer stands in the attitude of one acting contumaciously, and denying the validity of the tax after this court had practically decided its validity against the plaintiff in error in *Wright v. Railroad Co.*, 195 U. S. 219. * * * We must decide the case in view of its relations to a taxpayer not fraudulently concealing his property and honestly contending, with reasonable grounds for the contention, that it is not taxable under the laws of the State. As we have seen, the system provided in Georgia by the statutes of the State as construed by its highest court requires of the taxpayer that he return all his property, whether his liability is fairly contestable or not, upon pain of an *ex parte* valuation, against which there is no relief in the tax proceedings or in the courts, except in those cases where fraud or corruption can be shown in the action of the assessing officer." 1. 141.

In the case in hand the record shows that the defendant made returns of his property for the years 1905, 1906 and 1907. Apparently he made no returns for the years 1893 and 1908 which years, presumably, the assessor made the assessments fairly and according to the best information within his reach. No claim to the contrary is made. It does not appear, nor is it of consequence, whether the defendant in failing to make returns in those two years was contumacious or merely negligent, but there is no suggestion that in so doing he was "hon-

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estly contending with reasonable grounds for the contention" that his property was not taxable, or that he had any good reason for not making returns. The plaintiff-in-error here, therefore, is not in the position of the plaintiff-in-error in *Central of Georgia Railway v. Wright*. His rights not being affected by what the law may be in case a person fails to make return under circumstances like those appearing in that case it is unnecessary to go into the question whether under such circumstances the procedure prescribed by our statute is lacking in due process of law. A question of the alleged conflict of a statutory provision with the constitution will not be considered at the suit of one whose rights appear not to be affected by such provision. *Turpin v. Lemon*, 187 U. S. 51, 60; *Grenada Lumber Co. v. Mississippi*, 217 U. S. 433, 442; *In re Craig*, 20 Haw. 483, 490.

However, the plaintiff-in-error is in a position to urge that the provisions of section 1235 of the Revised Laws were lacking in due process of law in that the section submitted to the "doom" of the assessor persons who have negligently failed or contumaciously refused to return their property for taxation after notice so to do as required by other sections of the statute.

In *Cooley on Taxation* (2nd. ed.) 358, it is said "The right to discriminate in some manner against those who fail to hand in lists has often been judicially recognized. When the discrimination consists merely in submitting the party to the 'doom' of the assessor, and depriving him of any appeal, it would seem that there could be no valid objection to it." The Massachusetts system is similar to ours so far as the point involved is concerned and its constitutionality has been upheld not only by the courts of that State but by the supreme court of the United States. There the statute provided that the assessors "shall ascertain as nearly as possible the particulars of the personal estate, and of the real estate in possession or occupation, as owner or otherwise, of any person who has not brought in such list, and shall estimate its just value, according to their

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best information and belief." (R. L. Mass. Ch. 12, Sec. 47) "Such estimate shall be entered in the valuation book, and, except as provided in sections forty-one and seventy-four, shall be conclusive upon any person who has not seasonably brought in a list of his estate, unless he can show a reasonable excuse for the omission." (Id. Sec. 48) "A person shall not have an abatement, except as otherwise provided, unless he has brought in to the assessors the list of his estate as required by section forty-one." (Id. Sec. 74) The validity of these provisions was questioned in the case of *Harrington v. Glidden*, 179 Mass. 486, where the court said (p. 495) "The defendant's brief contains an elaborate argument in support of the proposition that our statutes relating to the assessment of taxes are unconstitutional because they do not give the party assessed an opportunity to be heard. But he does have full opportunity to be heard before the assessing board, if he desires it, before the demand becomes conclusively established against him, and that is enough." The case was affirmed in *Glidden v. Harrington*, 189 U. S. 255. And the ruling was reiterated in *Sears v. Assessors*, 208 Mass. 208, 211, where the case of *Central of Georgia Railway v. Wright* was cited and distinguished. Under the Massachusetts act a person failing to make a return may apply for an abatement of the assessment if he is able to show a reasonable excuse for the omission, but as to obdurate or negligent persons the law is the same there as in this jurisdiction. By failing to take advantage of the opportunity after notice to render their returns such persons place themselves in a position where, though they may defend against an attempt to collect the tax by showing its illegality, they are foreclosed as to the question of valuation. This would seem to be reasonable, and we have found no decision of the supreme court of the United States which holds or intimates that such a provision is obnoxious to the Fourteenth Amendment of the Constitution. The contention of the plaintiff-in-error is not sustained.

Judgment affirmed.

C. W. Ashford for plaintiff-in-error.

L. P. Scott, Deputy Attorney General (Wade Warren Thayer, Attorney General, with him on the brief), for defendant-in-error.

WILLIAM KAHUI UUKU *v.* ELIZABETH KAIO AND
ELSIE KAPU.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

ARGUED OCTOBER 20, 1913.

DECIDED NOVEMBER 5, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

EVIDENCE—pedigree—sufficiency to sustain verdict.

Upon an issue as to whether P and I, now dead, were half brothers, the plaintiff's proof consisted solely of the hearsay testimony of witnesses who claimed to have been told by P, I and K, the latter a brother of I, that P and I were half brothers. The testimony of these witnesses was such as to permit reasonable men to doubt its truth. For the defendants some witnesses who were members of the family of I and K and others who though not thus related were so situated as naturally to have heard of the alleged relationship if it existed, testified that at no time prior to the litigation had they heard that P was the half brother of I. Held, that a verdict that P was not the half brother of I was sustained by evidence.

TRIAL—instructions—positive and negative testimony.

An instruction that "all other things being equal, the witnesses of equal credibility, testimony of a positive character is more to be relied upon than testimony of a negative character" is correctly refused where it is unaccompanied by a specific statement of the circumstances under which the rule may be applied and is inapplicable to hearsay testimony admitted upon a question of pedigree.

NEW TRIAL—newly discovered evidence—due diligence.

A new trial will not be granted on the ground of newly discovered evidence where the movant might by the exercise of due diligence have discovered the proposed evidence before the trial.

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Search for the evidence wherever there is a probability of finding it is essential to due diligence. The rule is especially applicable where there have been several trials.

In order to justify the granting of a new trial on the ground just stated it must appear that all of the attorneys who presented the movant's case at the past trials used such due diligence and that none of them were aware of the existence of the proposed evidence.

OPINION OF THE COURT BY PERRY, J.

The plaintiff brought an action to quiet title, claiming an undivided one-eighth interest in fee simple in certain lands described in the declaration. The defendants denied that plaintiff had any title and the verdict and the judgment were for the defendants. Thereupon plaintiff sued out this writ of error.

At the trial now under review it was stipulated "that the plaintiff and the defendants both claim an interest in the lands described in plaintiff's complaint under the same source of title, to wit, as heirs of Isaac H. Kahilina, deceased; that the defendants claim an interest in the lands described in plaintiff's complaint as the heirs of Isaac H. Kahilina, deceased, by descent from said Isaac H. Kahilina; and that all of the lands described in plaintiff's complaint were at and before the death of Isaac H. Kahilina owned by him in fee simple." From undisputed evidence it further appeared that the defendants were the daughters of Kaukaha, the brother of Isaac Kahilina; that the parents of Isaac and Kaukaha were Kahilina, Senior, and Kenoi (w); and that the plaintiff was the son of Ana, one of the daughters of Paulo (k) and Ia (w). It was claimed by the plaintiff and not denied by the defendants that if Paulo was, as asserted by the plaintiff, the half brother of Isaac Kahilina the plaintiff was entitled to a verdict for an undivided one-eighth interest in the lands described in the declaration; and the sole issue of fact at the trial was whether Paulo was the half brother of Isaac, the plaintiff's claim upon this point being that Kahilina, Sr., was the second husband of Kenoi,

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that the latter had a first husband named Kamahuula and that Paulo was the son of Kenoi by Kamahuula.

The verdict shows that the jury found from the evidence that Paulo was not the half brother of Isaac or at least that the plaintiff did not prove to the satisfaction of the jury by a preponderance of the evidence that Paulo and Isaac were half brothers. It is assigned as error that the finding is contrary to law, in that, as it is contended, the plaintiff's evidence was a prima facie showing of the existence of the relationship and that the defendants' proof did not rise beyond the dignity of a "scintilla of evidence" of its non-existence.

Kenoi, Kahilina, Sr., Isaac, Kaukaha and Paulo were all dead at the time of the trial. Kamahuula, presumably, died before Kenoi. Testimony from any and all of these persons was therefore unavailable. So also the plaintiff did not produce any entries from a family Bible or from tombstones or any other record evidence of a similar nature. His case upon the disputed question of fact rested wholly upon hearsay testimony properly admitted under the well-known pedigree exception to the hearsay rule. Six witnesses gave this testimony, which was to the effect that on one or more occasions Paulo or Kaukaha or Isaac, or more than one of them, as the case might be, had stated to each of the witnesses that Kenoi, the wife of Kahilina, Sr., had a first husband named Kamahuula and that Paulo was the son of Kenoi by Kamahuula and therefore the half-brother of Isaac and Kaukaha. In view of plaintiff's contention that the jurors were under a legal obligation to accept this evidence as true and to return thereon a verdict in his favor, some further reference to these witnesses and their testimony will not be out of place.

Hana Scott and Puali Keawe were daughters of Paulo and sisters of Ana, the plaintiff's mother. Each testified that their parents had six daughters, Hana, Puali, Ana, Maluae, Pouli and Mahoe. On cross-examination Hana admitted that some years earlier at a judicial hearing concerning the administra-

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tion of the estate of Isaac Kahilina she had "only mentioned three" daughters of her parents, explaining the former testimony by saying that four witnesses who had in that proceeding taken the stand before her had testified to three daughters only and that she (Hana) was excited and had "testified the same way" as the four witnesses. Isaac died in 1902; and yet Hana, who was born in 1867, admitted that she had once only visited at Isaac's. Puali likewise admitted that in the administration case she had testified that Paulo and Ia had only two children, giving as a reason for her testimony that she was excited; and defendants introduced in evidence an affidavit sworn to by Puali in 1905 in which the deponent said, *inter alia*, that "Paulo (k) married Ia (w) and two children were born by them, viz.: Hana (w) and Puali Keawe (w)." Puali, while testifying that Paulo had told her who his parents were, said that neither of her parents had ever told her the name of her maternal grandmother.

Uuku, the father of plaintiff, after stating that he had known Paulo and that he had heard that his wife, Ana, and Puali were related to Paulo, was asked, "What did he say about his relationship with these people" (meaning, clearly, Ana and Puali) "if anything?" and replied, "He said he had two brothers on Kauai." The answer was stricken out, by consent, because not responsive.

Mrs. Paookalani and Noa Kuiki were not related to any of the members of the family under consideration. Paoo thought he was related to some of them but far from clear as to what the relationship was. Noa on cross-examination testified that Isaac had told him that Kahilina, Sr., was the father of Paulo as well as of Kaukaha and Isaac, a claim in conflict with that presented by the testimony of four of the other witnesses called on plaintiff's behalf.

Paoo testified in his direct examination that Kaukaha told him that he had two brothers, Paulo and Isaac, and that Paulo told him that he had two brothers, Kaukaha and Isaac, but

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upon cross-examination he admitted that, while he had been a witness at two former trials in this case, he had not at the first trial mentioned Kaukaha's alleged statement and had not at the second trial spoken of Paulo's alleged statement. He further stated on cross-examination: "I did not state that Kaukaha told me that he was related to Paulo"; and "all he said was that I, the witness, was related to him." Asked on re-direct, "Is it not true that upon some other occasion, some other time, Kaukaha did say that Paulo was his brother?" he answered: "Yes, I did hear him say that on another occasion." Still later, when plaintiff's attorney remarked to him, "Now, let's get the truth of this thing" and asked, "Did Kaukaha ever, at any time, any subsequent time, any time in your life, did Kaukaha ever tell you or not, that Paulo was his older brother?" the witness replied: "At no time. The only thing he said to me was that I was related to them."

Mrs. Paookalani testified that Isaac told her that Paulo was "his own older brother" and that Kaukaha told her that Paulo was "his half brother through his mother."

There can be no doubt that if the jury had believed the testimony of these six witnesses and had returned a verdict for the plaintiff the verdict could not have been set aside on the ground that it was unsupported by evidence; but the testimony was not such as to require, as a matter of law, a verdict for the plaintiff. As reasonable men actuated solely by a desire to arrive at the truth and to render justice to both parties the jurors could well have felt that the evidence of Hana and Puali was tainted with some degree of improbability and that their failure in their earlier statements under oath to disclose the fact of the birth of six children to their parents rendered any reliance on their evidence wholly unsafe. They may well have been unfavorably impressed with the undue eagerness of Uuku, Sr., to place before the jury the information that Paulo had told him that he (Paulo) had two brothers on Kauai. Their confidence in plaintiff's case may well have been lessened upon finding Noa

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Kuiki and Mrs. Paookalani giving evidence tending to show that Paulo was the full brother of Isaac and Kaukaha, while the remaining four witnesses gave evidence tending to show that Paulo was a half brother only. And they may well have concluded that Paoo's testimony was too contradictory upon essential matters to permit of any credence being attached to it. Had the determination of the issue of fact rested solely upon a consideration of the plaintiff's evidence, the jury could reasonably have felt that they were not satisfied of its truth and that the plaintiff had not successfully borne the burden of proof cast upon him by law. There may be and doubtless are instances where a plaintiff's prima facie proof is such as not to admit, in the absence of evidence to the contrary, of an adverse verdict, but this is not a case of that nature.

Upon another ground, however, the verdict must be sustained and that is that the defendants' evidence was clearly sufficient to support it.

Hana Scott, daughter of Paulo, had testified, for the plaintiff, that at a certain luau and in the presence of Elizabeth Kaio, daughter of Kaukaha, Paulo had said that "if his mother had died in giving him, Paulo, birth, Mrs. Kaio never would have existed,"—another way of saying that Paulo's mother Kenoi was the mother of Kaukaha. Elizabeth, in the course of her testimony on her own behalf, denied absolutely that Paulo ever made that statement in her presence.

A brief statement of some of the remaining evidence adduced for the defense here follows:

Elizabeth Kaio was born in 1863 at Hanalei and lived with her parents till her death. She knew Isaac, lived at his home for one year after Kaukaha's death, and visited there at subsequent times. Her father kept a family Bible and in it made entries of births and deaths. (Leaves from this Bible were introduced at the trial but are not with the record now before us.) At no time prior to the commencement of this litigation did she hear from any member of the family or from any other

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source that Paulo was the half brother of her father. None of her family received letters or visits from Paulo.

J. A. Kaopuo was born in 1857 at Hanalei. His mother was Paakii who after the death of his father married Kaukaha. This witness lived in the same home with Elizabeth and her mother for ten years before Kaukaha's death and for ten years after that event and at no time heard in the family circle that Isaac and Kaukaha had a half brother. During that period of twenty years Paulo did not visit at the Kaukaha home.

Mary Kaiawe, whose mother's sister was the wife of Kaukaha, was born in 1855 and knew Kahilina, Sr., Isaac and Kaukaha and saw Paulo in Hanalei. She visited frequently at Kahilina, Sr.'s, slept there and had meals there; also lived there for a period of six or more years. Paulo when at Hanalei lived at the home of one Kealaiki and not at the Kahilina home. Witness was a schoolmate of Maluae, daughter of Paulo. Maluae lived at Kealaiki's. Witness never saw Maluae at the Kahilina home and never heard from Isaac or Kaukaha that Paulo was their half brother.

Kekahimoku, nephew of Kahilina, Sr., was born in 1832 and moved to Kauai in 1857. He often visited at the Kahilinas in Hanalei and would remain there for months at a time. Knew Kenoi, Kaukaha and Isaac. Saw Kaukaha's dead body and was present at Isaac's death. Never heard of Kamahuula or that Kenoi had a first husband or a son Paulo or that Isaac and Kaukaha had a half brother.

Sam Kanewanui, administrator of Isaac's estate, established a permanent home in Hanalei in 1876, the year after Kaukaha's death. He married Loki, a daughter of Kaukaha's wife and after his marriage lived in Kaukaha's home; witness knew Isaac intimately until his death. Never heard from Isaac or in the Kaukaha home that Paulo was a half brother.

J. S. Kaheleiki was born in 1835 and resided at Hanalei from the fifties until the time of the trial. Lived "within calling distance" of the Kahilina home. For years knew Isaac

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and Kaukaha well. Knew Maluae; she lived at Kealaiki's and witness never saw her at the Kahilinas'. Never heard that Ke-noi married Kamahuula or that Isaac and Kaukaha had a half brother.

S. W. Wilcox was born in Hanalei in 1847, lived there till 1872 and visited the place after that. Was sheriff of Kauai from 1872 till 1895 or 1896. Lived about one-half mile distant from home of Kahilina, Sr. Knew Kaukaha and Isaac very well, was schoolmate of Kaukaha. Isaac was district magistrate and a senator; Kaukaha practiced law and was a member of the legislature. Both were prominent in the community. Never heard of their having a half brother. Knew Maluae from childhood to womanhood. She lived at Kealaiki's and witness never saw her at the Kahilina home.

A. S. Wilcox, born in 1844, spent much of his time in Hanalei from 1846 till 1877. Knew Isaac and Kaukaha and was intimate with the latter in his later years. Knew natives by the name of Paulo but never heard of any Paulo being half brother of Isaac and Kaukaha. Neither Isaac nor Kaukaha ever referred to any half brother.

Counsel for plaintiff characterizes the testimony of these witnesses as being purely negative and as constituting at best a mere scintilla of evidence. It cannot be so regarded. It came, in the main, from persons who were either members of the Kahilina family or otherwise so situated as to have ample opportunity to learn of Paulo's relationship to Isaac and Kaukaha if it had existed. Under the circumstances their failure to hear of a half brother may properly have been regarded by the jury as good cause for believing that none such ever existed,—at least it would justify a finding that plaintiff had not proven the alleged relationship by a preponderance of the evidence.

Elizabeth Kaio gave testimony which is construed by plaintiff's counsel as an admission that in 1906 she paid Hana and Puali the sum of \$5500 for a conveyance of their interest in the property in question and therefore as a further admission

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of title in the plaintiff. The testimony referred to was not direct or clear, but assuming that it was capable of the construction contended for its weight was nevertheless a matter for the consideration of the jury. The issue was not whether Elizabeth purchased the supposed interests of Hana and Puali but whether Paulo was the half brother of Isaac. Moreover the purchase of such an outstanding claim is not necessarily an acknowledgment of title in another claimant. See *Smith v. Hamakua Mill Co.*, 13 Haw. 716.

It is further assigned as error that the court refused to instruct the jury that "all other things being equal, the witnesses of equal credibility, positive testimony on a given point must always predominate over negative testimony on the same point; testimony of a positive character is always more to be relied upon than testimony of a negative character." Even if it were otherwise unobjectionable, the instruction was correctly refused because it was ambiguous and misleading. What meaning would the phrase, "all other things being equal," convey to a jury of laymen unaccustomed to analyzing the indicia of credibility and to the rules relating to the weighing of evidence? One prerequisite to the applicability of the instruction is stated, to wit, that the witnesses must be of equal credibility; but the other prerequisites are not defined. The relationship of the witnesses to one or more members of the family, the degree of intimacy of their acquaintance with Paulo, or with Isaac, or with Kaukaha or Kenoi, their place of residence with reference to that of the Kahilina family, their opportunities or lack of opportunity for receiving information concerning the alleged relationship between Paulo and Isaac, the probability or improbability of their hearing of the existence of the fact, if it did exist,—none of these matters were mentioned to the jury as necessary to be considered in determining whether "all other things" were equal. Nor was it pointed out that the phrase had no reference to the mere number of witnesses' testifying upon a given subject.

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It has been, indeed, declared in some cases that positive testimony is entitled to greater weight than that which is purely negative, the reasons given being, in substance that "it is possible to forget a thing that did happen and it is not possible to remember a thing that never existed" (*Stitt v. Huidekopers*, 17 Wall. 384, 394) and that "the negative witnesses may not have had their attention excited at the time." Where the reason for the rule does not exist, the rule itself does not apply. The same result follows where the evidence is not positive on the one hand or negative on the other within the meaning of the rule. The rule is "subject to so many exceptions as not to be of much practical use and if carelessly administered may work much mischief." *Smith v. McIlwaine*, 70 N. C. 287, 289. It does not apply to a case, like that at bar, where upon an issue of whether or not a certain relationship existed between two persons hearsay testimony is admissible. See *Wilson v. M'Ghee*, 4 Ky. 34, 35. The assertion by defendants' witnesses that they never heard from Isaac and Kaukaha that Paulo was Isaac's half brother is as truly positive as is the evidence of plaintiff's witnesses that they did hear the statements made by one or more of the parties named. If the defendants' witnesses had equal or better opportunities of information and if the jurors regarded them as in every way trustworthy and credible, then the very fact that no member of the Kahilina family ever made such a statement to any of defendants' witnesses might be in itself properly deemed by the jurors good ground for disbelieving the assertions of plaintiff's witnesses. Had the requested instruction been given this course of reasoning might well have been regarded by the jurors as not open to them.

Plaintiff moved for a new trial on the further ground of newly discovered evidence consisting of certain "entries in an official record book of the Laie, Oahu, Mission of the Church of Jesus Christ of the Latter Day Saints, said entries on their face showing that Paulo was the son of Kenoi and tending strongly to show that Paulo was the husband of Ia." In sup-

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port of the motion an affidavit was filed showing that the record referred to was a "Book of Members" of the church named, in the official custody of Adelbert Bigler, an elder of the church and clerk of the Mission at Laie; that the "Book of Members" contains an accurate and complete record "of the name, date of birth, place of birth, and date of baptism of each member of said church aforesaid from its institution in said Territory, together with a record of the name of the father and mother, the place of baptism, the name of the person baptizing, the name of the office held in said church and the date when such office was taken together with the name of the person confirming the member to such office, for each and every member of said church since its institution in said Territory"; that the entries are as follows:

"Sex	Name	Date of Birth	Place of Birth	Name of father
Male:	Paulo:	1835:	Hanalei, Kauai:	Waiohakini
"Name of mother	Date of baptism	Place of baptism	By whom	baptized
Kenoi:	1862:	Pokii, Kauai:	Hoepu:	
"Church office	When chosen to office	By whom ordained		
Elder:	1862:	Palau:";		

that "accompanying said entries and immediately following the same is the record of entries concerning one 'Ia' a female, the record giving the date of her birth as 1838 and the date of her baptism as 1862, the same year with Paulo above named; that from the position of said entries as to the said Ia, your affiant believes without doubt that said Ia was the wife of said Paulo.

The evidence of the elder as to his belief concerning the inference to be deduced from the fact that the entries relating to "Ia" immediately follow those relating to "Paulo" would be inadmissible. Any such inferences, if proper at all, are to be made by the jury and not by witnesses. There is no memorandum in the book showing whether Ia was the wife of Paulo and the movant did not offer to prove that in the book the name of an unmarried woman never appears immediately following that of a married man.

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It may be assumed that the book and its entries were admissible as evidence, that the evidence thus sought to be introduced was not merely cumulative within the meaning of the rule relating to new trials and that it was of such importance and probative force as to justify the granting of the motion under consideration. For another reason, however, a new trial should not be ordered.

It is well settled that in order to prevail a party seeking a new trial on the ground of newly discovered evidence must show that due diligence was used to discover it. *Malani v. Puhi*, 5 Haw. 504. "It should appear not only that the proposed testimony is newly discovered, that it would be material to the issue and that it would not be merely cumulative, but that the" movant "did not lose the opportunity to lay it before the jury by his own laches. For when it appears to the court that the party might, by the exercise of due diligence, have discovered and obtained the proposed new testimony at or before the time of the trial, a new trial will not be granted",—with certain exceptions inapplicable in the case at bar. *Weston v. Montgomery*, 2 Haw. 309, 310. "There are but few cases tried in which new evidence cannot be hunted after trial, and in order to secure to parties the termination of their legal controversies the court must be wary about granting new trials upon insufficient excuses for not procuring the evidence when the parties had their day in court." *Burns v. Bowler*, 4 Haw. 303, 304. See also *Territory v. Kum Foo Sung*, 20 Haw. 195, 197. With equal clearness it has been held that the movant "must search for it" (the evidence) "wherever there is a probability of finding it". *Clement v. Cartwright*, 7 Haw. 676, 678; *Kaheana v. Nalimu*, 8 Haw. 271, 272.

This action was instituted in January, 1908, the law firm of Thompson & Clemons being then attorneys for the plaintiff, and was at issue in July of the same year. A trial was had in the early part of 1911 resulting in a directed verdict in favor of the defendants. Upon exceptions the verdict was set aside for error

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of law committed by the presiding judge. At the second trial the jury failed to agree. A third trial, that now under review, was had in March of the present year. Isaac Kahilina died in 1902 and judicial proceedings relating to his estate were had in the probate court on Kauai in the course of which inquiry was made and evidence taken as to who inherited the personalty. Hana Scott and Puali Keawe testified at that hearing on the subject of the family pedigree. Mr. Lymer, of the firm of Thompson, Wilder, Watson & Lymer, appeared for the plaintiff at the last trial and had charge of the preparation of the case for that trial. Mr. Russell, of the same firm, was associated with Mr. Lymer at the last trial. In an affidavit filed in support of the motion for a new trial Mr. Lymer says: "that affiant, since his first connection with said case, has used the utmost diligence in tracing out and discovering all existing evidence material to the issues in said cause; that affiant has closely questioned every available witness and many old residents and has employed competent Hawaiians to make similar inquiries concerning all possible sources of evidence bearing upon said case; that all the living members of the family of the said Paulo have been many times questioned by affiant concerning the early life of the said Paulo, as to what fraternal or religious bodies he may have belonged to, as to any living persons who might know of such matters and affiant has used every means in his power to discover all material evidential facts bearing on said case but that at no time was it ever intimated to affiant by any one of the scores of people he has interviewed that Paulo was at any time a member of said Church of Jesus Christ of the Latter Day Saints; that affiant is not familiar with the customs of said church and did not know that any central office or Mission of the same where records of members thereof for the entire Territory were kept; that so far as the results of all of affiant's exhaustive efforts to discover evidence were concerned it did not appear that the said Paulo ever belonged to any organization either fraternal or religious within this Territory". Just when

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Mr. Lymer's active connection with the case commenced is not shown. For aught that appears to the contrary it may be that some other member of the firm had charge of the preparation and presentation of plaintiff's case for the purposes of one or both of the earlier trials and there is no attempt at showing what efforts such other attorney, if any, made to procure evidence of the nature of that now sought to be introduced. If another attorney represented plaintiff at the earlier trials due diligence on his part also would be requisite in order to secure a new trial on the ground of newly discovered evidence. As far as the showing made is concerned, it may even be true that the earlier attorney was aware of the existence of this Mormon record but failed to introduce it for reasons which to him were satisfactory and that Mr. Russell also was aware of its existence. The decision, however, need not be based on this ground alone. Although it appears that Mr. Lymer examined "scores of people" as to what fraternal or religious organizations Paulo may have been a member of, it does not appear that search for the evidence was made by him or his client or on their behalf in the places where there was the greatest probability of finding it. It is a matter of common knowledge that the facts of baptism and membership in a religious body are often recorded, with accompanying explanatory notes relating to parentage and date of birth, on books maintained for the purpose by the religious body. It is common practice for those preparing the proofs on issues of Hawaiian pedigree to inquire at the churches, or other headquarters of the religious organizations, for such records and to examine them when found for the desired information. It is in the churches themselves that there is the greatest probability of obtaining authoritative information as to the existence and contents of such records. That the "Church of Jesus Christ of Latter Day Saints," generally known as "the Mormon Church", has an office and church in Honolulu, as well as a large colony and a church at Laie on this Island, is well known in the Territory. The plaintiff having failed to search for the

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evidence "wherever there was a probability of finding it" (*Clement v. Cartwright, supra*), a new trial cannot be granted. The facts that at the time of the last trial the action had been pending for more than five years and that two trials had already taken place at each of which the plaintiff failed to obtain a verdict should have rendered all the clearer to plaintiff the necessity of diligence in the search for further evidence to strengthen plaintiff's case and emphasizes now after the third trial the propriety of the rule that in the absence of such diligence further litigation should not be permitted. "Courts are reluctant to grant a new trial for the discovery of new testimony after one trial,—much more after two. They require vigilance on the part of those in litigation in discovering and procuring material and important testimony. * * * Courts should be strict in their requirements when new trials are sought for such cause." *Trask v. Unity*, 74 Me. 208, 209, 211. "In deciding motions for new trials on account of newly discovered evidence courts have found it necessary to apply somewhat stringent rules to prevent the almost endless mischief which a different course would produce." *State v. Carr*, 21 N. H. 166, 173. "The rule" requiring diligence "is especially applicable * * * where there have been several trials." 29 Cyc. 891, 892. See also *Hoban v. Sandford*, 64 N. J. L. 426, 437 and *Hagen v. R. R.*, 91 N. Y. S. 914, 916.

The judgment is affirmed.

W. B. Lymer and B. S. Ulrich (*Thompson, Wilder, Watson & Lymer* on the brief) for plaintiff.

A. Lindsay, Jr., for defendants.

CONCURRING OPINION OF ROBERTSON, C.J.

I concur in the conclusion reached by the majority, also in the reasoning except as to the last point—the motion for a new trial on the ground of newly discovered evidence. It seems to me that except in one respect which will be explained the showing made as to diligence on the part of Mr. Lymer and the plaintiff

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in searching for evidence was ample and constituted a stronger showing than was made in many cases that might be cited in which a new trial was granted. The statement made in the case of *Clement v. Cartwright*, 7 Haw. 676, 678, that a party must search for evidence "wherever there is a probability of finding it" would at first sight appear to require more than reasonable diligence but the opinion shows that it was intended as nothing more than an elaboration of the statement that a party must show that he used "due diligence." Such is the familiar rule. *Territory v. Kum Foo Sung*, 20 Haw. 195. More than reasonable diligence is not required, and in determining whether a sufficient showing has been made the court should take a reasonable and practical view of the situation. The fact that the evidence was in existence and that a more thorough search would have unearthed it does not prove that reasonable diligence was not used in the endeavor to find it. See *Hays v. Westbrook*, 22 S. E. (Ga.) 893; *Hilburn v. Harris*, 21 S. W. (Tex.) 572; *Sympton v. Bell*, 112 S. W. (Ky.) 1133; *Usher v. Ry Co.* 132 Fed. 405. Reasonable diligence does not necessarily involve an effort by the party to discover a book, writing or other evidence which he had no reason to believe existed, nor notice of any circumstances to put him upon inquiry concerning it. *Skinner v. Walker*, 98 Ky. 729, 736; *Watts v. Howard*, 7 Met. 478, 480; *St. Louis etc. R. Co. v. Hurley*, 30 Okl. 333, 339. In the case at bar exhaustive inquiry by Mr. Lymer failed to elicit any information which would lead him to suppose that Paulo had been baptized in the Mormon faith. Nothing whatever presented itself to prompt him to search the ancient archives of any particular church for a record of Paulo's baptism and reasonable diligence did not require that he should have searched the records of the various churches throughout the Territory. As there did not appear to be a "probability" of finding in the records of the Church of Jesus Christ of Latter Day Saints a record of Paulo's pedigree the failure to inquire for and search

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those records did not constitute a lack of diligence on the part of the plaintiff or his counsel.

But in another respect the plaintiff's showing was deficient. Mr. Lymer is a member of the firm of attorneys which, with some changes in personnel, has represented the plaintiff since the action was instituted over five years ago. He does not say in his affidavit that he has had charge of the case since its inception or exclusively at any time. I understand it to be admitted that Mr. Lymer did not handle the case at the first trial. Who had charge of it at the second trial does not appear. The record shows that at the last trial J. W. Russell was associated with Lymer. From the fact that the evidence offered was not known of by Mr. Lymer until after the trial it does not necessarily follow that it was not known to counsel who acted for the plaintiff before Mr. Lymer took charge of the case nor does it follow that the existence of the evidence was not known to his associate Mr. Russell. The affidavits in support of the motion did not negative these possibilities. The plaintiff himself is chargeable with all the information which any and all of his attorneys had concerning the case, and if one of his attorneys other than Mr. Lymer had been aware that the evidence was available but thought it was not needed, or for any reason decided not to produce it, another trial of the case is not to be had simply because present counsel was not aware that the evidence existed and failed to find it after diligent search. In justice to the opposing party courts must demand a strict compliance with the rule which requires the moving party to show that neither he nor any attorney of his who has had any connection with the case knew of the existence of the evidence alleged to be newly discovered. Upon this ground I concur in the overruling of the exception to the denial of the motion for a new trial for newly discovered evidence.

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RIVERSIDE PORTLAND CEMENT COMPANY v. THE
VON HAMM-YOUNG COMPANY, LIMITED.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

RIVERSIDE PORTLAND CEMENT COMPANY v.
ALLEN & ROBINSON, LIMITED.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED OCTOBER 30, 1913.

DECIDED NOVEMBER 12, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

CARRIERS—bill of lading—presumption of ownership.

The presumption of ownership of property arising from the possession of a bill of lading indorsed to the order of the holder may be explained or rebutted by other evidence showing where the real ownership lies.

ESTOPPEL—bill of lading—warehouse receipt.

The plaintiff being the owner of certain cement in Los Angeles shipped the same by rail to San Pedro, the bill of lading therefor being indorsed to the order of T, a special agent of plaintiff for the sale of the cement in Honolulu. On arrival of the cement in Honolulu it was stored in warehouses in the name of T, who, by the terms of the agency agreement, was to assume all expenses of unloading, storing and marketing the cement. T bartered the cement for a ship. Held, that the plaintiff, in an action of trover, was not estopped to assert its title to the cement as against the defendants who received certain of the cement or proceeds of sales thereof crediting same against antecedent debts of the former owner of the ship.

OPINION OF THE COURT BY ROBERTSON, C.J.

These are actions of trover to recover the value of certain cement alleged to have belonged to the plaintiff and to have been converted by the defendants. Judgment was for the defendant in each case. The cases were heard together, jury waived, and the following statement of the general facts is taken from the decision of the court. With the exception of

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the first finding which we have corrected in parenthesis there was testimony tending to support these findings: "The plaintiff being the owner of a certain two thousand barrels of cement in Los Angeles, California, shipped such cement to its own order to San Pedro, California." (The testimony was uncontradicted that the cement was consigned to the "Crescent Wharf and Warehouse Company, San Pedro, order of A. W. E. Thompson.") "This was a railway bill of lading and had nothing to do with any water shipment. Prior thereto, on April 12th, 1910, the plaintiff had entered into a written agreement with one A. W. E. Thompson whereby Thompson was made the agent of the plaintiff to sell the said two thousand barrels of cement under a special and limited agency. This agreement provided that the plaintiff should land the cement on the docks in Honolulu; that the plaintiff would 'endorse the bill of lading or such other evidence of shipment as is used in the premises to the order of A. W. E. Thompson, agent;' and that the agent should thereupon assume all expenses of unloading, hauling, handling, insurance, marketing, selling, etc., of the cement. The agent was likewise limited in his method of selling to a price 'not less than \$2.75 per barrel, lawful money of the United States, and on a credit of not greater than sixty days after delivery.' The agreement provides further that the agent upon making sales shall immediately remit the money and should render monthly accounts to the principal. Up to July 28th, 1910, apparently only two hundred barrels of cement had been disposed of. On that date (or July 29th) an agreement was entered into between Thompson, the Miller Salvage Company, Limited, and Guy L. Duckworth, Trustee. By this agreement it appears that the President of the Salvage Company, Captain F. C. Miller, had been authorized to sell the Bark 'Alden Besse;' that pursuant to that power he by this agreement was to sell the bark to Thompson and in consideration therefor Thompson was to hand over ('sell and deliver,' as the agreement states it) the remaining eighteen hundred barrels of cement. Duckworth

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was to act as 'Trustee' of the parties; was to hold the 'Alden Besse' until payment for her had been made by the sale by such trustee of the cement at \$2.65 per barrel; out of the net proceeds of such sales to pay the Miller Salvage Company \$2380.00; to pay certain notes given by C. F. Miller to J. W. McCauley for \$1500.00, the payment of which was to release certain pumps held in a warehouse in Los Angeles, and upon the payment thereof to hand the pumps over to the said C. F. Miller. The surplus over and above the \$2380.00 received by the trustee Duckworth was to be handed over to Thompson. Meanwhile the cement in question was in warehouses in Honolulu under the name of Thompson. Upon execution of the tri-party agreement Thompson notified the warehouses to deliver the cement only on the order of Duckworth. After the execution of the tri-party agreement the following transactions occurred: C. F. Miller, or the Miller Salvage Company, was indebted to each of the defendants herein. Miller went to the von Hamm-Young Company, Limited, and asked them to take cement for their claim against him. After some discussion it was agreed between them that the von Hamm-Young Company, Limited, should sell as much of the cement as they could and credit the amounts received from the sale of the same to the Miller account. To Allen & Robinson the Salvage Company or Miller was likewise indebted and to it was sold 750 barrels of cement for \$1875.00 and that amount was credited to the account of the Salvage Company. The accounts of Allen & Robinson show that of this amount 1950 bags were sold for \$1412.93 and that amount credited to the account of the Salvage Company. The remainder of the cement being damaged was not received by Allen & Robinson. The price for which the cement was sold to the defendants was \$2.50 per barrel, with a supposed rebate of ten cents a bag for the return of the bags, making a net price of \$2.10 per barrel (there being four bags to the barrel). This was below the price at which Thompson had

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been authorized to sell, that price being originally \$2.75 per barrel and later reduced by cable to \$2.45 per barrel."

The apparent inconsistency between the statements that it was agreed that "the von Hamm-Young Company, Limited, should sell as much of the cement as they could and credit the amounts received from the sale of the same to the Miller account" and that "the cement was sold to the defendants," is a reflection from the testimony in the von Hamm-Young Company's case. The managing director of that company who was called as a witness for the plaintiff testified variously that "the matter was referred to me to pass on, whether we should make—take—sell any of that cement or not, and I authorized it;" that he authorized the "purchase" of the cement by his company; that "we didn't take over any cement;" that his company would "help Captain Miller to sell it;" that it "would simply find a purchaser and then seek a delivery direct from the warehouse;" and that on each occasion when a sale was made Duckworth "billed" the cement to the defendant. The court said that "the von Hamm-Young Company agreed to take the offer in this way, that if it found purchasers for the cement it would give orders therefor on Miller, who was to fill the orders from the warehouse, and the amount received from the sale of the cement was to be credited to the indebtedness of Miller or the Miller Salvage Company. In this way a large number of barrels of cement were sold by the von Hamm-Young Company and the money received therefor was transferred to the Miller accounts. This in my opinion does not constitute a possession of the property by the von Hamm-Young Company, at any time, either an actual or constructive possession." It did not clearly appear whether under the arrangement as made Miller or Duckworth were bound to honor the orders of the defendant company, and there was no express finding that the cement was not bought by or billed to the company; nor that the defendant did not claim or exercise any dominion over the cement. There was some slight evidence that the defendant company had cart-

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ed and delivered some of the cement but no reference was made to that in the decision. The findings were inconclusive. Under these circumstances it is difficult for this court to say whether the view which the court below seems to have taken, that the plaintiff had failed to show a conversion of any of the cement by the von Hamm-Young Company was supported by the evidence unless we go deeper into the question than we deem it necessary to do at this time. The testimony in several respects was vague and unsatisfactory, and a reading of the transcript gives us the impression that the facts were not brought out as clearly and in such detail as they might have been, and, as it may be expected, will be on another trial if one be had.

Upon undisputed evidence it seems clear to us that Duckworth was not a *bona fide* purchaser, or a purchaser at all, of the cement. For the convenience of Thompson and Miller he was made their trustee or agent. He claimed no beneficial interest in any of the property the title to which was agreed to be put in his name by the instrument dated July 29, 1910, and purported to have been given him by the bill of sale which was made by the other parties agreeably to the terms of that instrument. He appears to have taken no steps to sell the cement, the active parties in this connection being Thompson and Miller, principally the latter. Allen & Robinson, Limited, purchased 750 barrels through Miller (it being billed to that company, not by Duckworth, but by the Miller Salvage Company), and credited the amount of the purchase price against the antecedent debts of Miller and the Miller Salvage Company.

The circuit court held further that the plaintiff had proved its claim of ownership of the cement; that Thompson was merely a selling agent of the plaintiff with no title to the cement, and that in bartering it for a ship he was guilty of a conversion; but that as the plaintiff had held out Thompson as the owner of the cement both Miller and Duckworth were justified in dealing with him as the owner, Duckworth, as trustee, taking a good title to the property which he could transfer and as to the cement

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bought by Allen & Robinson, Limited, did transfer to it; and that as to the von Hamm-Young Company, Limited, it was the mere receiver in good faith of the proceeds of such of the cement as it sold.

The point that the plaintiff was bound by its alleged holding out of Thompson as the owner of the cement, though not mentioned in that part of the court's decision which dealt specially with the von Hamm-Young Company's case, was a general finding applicable to both cases and if Duckworth obtained a good title by estoppel against the plaintiff, then upon the theory that the von Hamm-Young Company was a mere selling agent for Duckworth or Miller it would follow that the plaintiff cannot maintain its action against that company. We therefore regard the conclusion that the plaintiff had precluded itself from claiming ownership of the cement as against Duckworth and Miller as affecting both cases, and hold that there was error in that conclusion and in the decision in each case.

The evidence which was claimed by the defendants and held by the court below to constitute a holding out of Thompson by the plaintiff as the owner of the cement consisted of the possession of the cement by Thompson, testimony of the contents of the bill of lading to San Pedro which was exhibited by Thompson, and the warehouse receipts showing that the cement was stored in Honolulu in Thompson's name, which the court found were also exhibited to Duckworth and Miller, though the evidence as to this was not at all clear. Reference also was made to a letter said to have been addressed to Thompson by the plaintiff corporation, a mortgage on a sampan, and a bill for certain engines. But the letter was not produced nor was testimony as to its contents admitted, and we see no significance in the mention of the mortgage on the sampan or the bill for the engines as they seem to have had no connection with the ownership of the cement. It was not shown in whose name the cement was shipped to Honolulu, and, possibly, that would be of no consequence. The question then is whether the entrust-

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ing of the cement to Thompson and his possession of the bill of lading and the warehouse receipts constituted a representation by the plaintiff that Thompson was the owner of the cement which would estop the plaintiff from asserting its title. No question as to the rights of a *bona fide* purchaser is involved. Neither Duckworth nor the Miller Salvage Company purchased the cement, and no consideration moved to the plaintiff from either defendant. Neither of the defendants claim to have bought upon the strength of any representations as to ownership in Thompson.

The case of *Pollard v. Reardon*, 65 Fed. 848, cited by the defendants, does not support the claim of estoppel made in this case. In that case the contest was between two parties who were creditors of the person who owned certain hides. Both held bills of sale of the hides, the consideration in each case being the endorsement of certain notes of the vendor. A bill of lading was given to the holder of the later bill of sale and it was held that he was entitled to the hides, upon their arrival at their destination, as against the holder of the earlier bill of sale. The court put it on the ground of estoppel, that the holder of the first bill of sale was presumed to have assented to the issue of the bill of lading to the second holder since he had not demanded it himself, also that as the holder of the later bill of sale took without notice of the prior bill and had in the meantime been compelled to pay the note he had indorsed he was in the position of a *bona fide* purchaser. Whether the views expressed in that case on the subject of bills of lading were in accord with those of the supreme court on the subject we need not stop to examine. In *Pollard v. Vinton*, 105 U. S. 7, 8, the court said, "A bill of lading is an instrument well known in commercial transactions, and its character and effect have been defined by judicial decisions. In the hands of the holder it is evidence of ownership, special or general, of the property mentioned in it, and of the right to receive said property at the place of delivery. Notwithstanding it is designed to pass from

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hand to hand, with or without endorsement, and it is efficacious for its ordinary purposes in the hands of the holder, it is not a negotiable instrument or obligation in the sense that a bill of exchange or promissory note is. Its transfer does not preclude, as in those cases, all inquiry into the transaction in which it originated, because it has come into the hands of persons who have innocently paid value for it. The doctrine of bona fide purchasers only applies to it in a limited sense." In *The Carlos F. Roses*, 177 U. S. 655, 665, the court said, "Bills of lading stand as the substitute and representative of the goods described therein, and while *quasi* negotiable instruments, are not negotiable in the full sense in which that term is applied to bills and notes. The transfer of the bill passes to the transferee the transferor's title to the goods described, and the presumption as to ownership arising from the bill may be explained or rebutted by other evidence showing where the real ownership lies. A pledgee to whom a bill of lading is given as security gets the legal title to the goods and the right of possession only if such is the intention of the parties, and that intention is open to explanation. Inquiry into the transaction in which the bill originated is not precluded because it came into the hands of persons who may have innocently paid value for it." In *Leuthold v. Fairchild*, 35 Minn. 99, 108, it was said that "A bill of lading is a symbol of the property. The indorsement and delivery of it is a symbolical delivery of the property, but does not, of itself, constitute a contract of sale any more than does an actual delivery of the property. Either operates to pass the title, when so intended. The intention and purpose with which the indorsement and delivery are made, and any conditions attached to the transaction, are open to explanation by parol, just as in the case of the actual delivery of the property itself. Naming one as consignee in, or indorsing and delivering to him, a bill of lading may be shown by parol to have been intended as evidence of an absolute sale, a trust, a mortgage, a pledge, a lien or a mere agency. The relation to the property of the par-

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ties named in it, or of the holder, and the purpose and effect of naming one as consignee in or indorsing and delivering the bill, are therefore not conclusively determined by the instrument itself, but may be shown by other evidence." Consistently with these principles this court held in the case of *Carty v. Jarrett*, ante, 274, 278 that where M, the owner of certain horses in San Francisco, shipped them by steamer to Honolulu in charge of H and consigned to H and M, and listed them in the same names with the federal quarantine officials, he was not estopped as against an attaching creditor of H to show that he was the sole owner of the animals and that H had no interest in them.

We are of the opinion that the warehouse receipts were no more effective as a representation by the plaintiff than the bill of lading and that the possession of the cement together with the bill of lading and warehouse receipts did not constitute a holding out of Thompson as the owner of the property. It follows that Allen & Robinson, Limited, when it bought, and von Hamm-Young Company, Limited, if it bought, did not get good title to the cement, and that the plaintiff is not estopped to assert its ownership.

At this time we prefer not to pass upon any of the other points which were argued as upon another trial the evidence may be different.

The judgments are vacated, the cases are remanded to the circuit court and in each a new trial is granted.

A. L. Castle and D. L. Withington (*Castle & Withington* on the brief) for plaintiff.

E. W. Sutton. (*Smith, Warren, Hemenway & Sutton* on the brief) for von Hamm-Young Company, Limited.

Holmes, Stanley & Olson for Allen & Robinson, Limited.

Lansing v. Dondero, 21 Haw. 736.

OLIVER G. LANSING v. A. H. DONDERO, DEFENDANT, STELLA PECK, GARNISHEE.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED OCTOBER 31, 1913.

DECIDED NOVEMBER 12, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

CONTRACTS—substantial performance—right of recovery.

When a structure has been completed in accordance with the specifications save only as to slight or unimportant defects caused by inadvertence or unintentional omissions and capable of being remedied at a comparatively small, ascertainable cost, and the building is not unfit for the use for which it was intended, the builder has a right of action against the owner for the unpaid balance of the contract price less the sum which it will cost to remedy the minor defects.

MECHANICS' LIENS—completion of building—abandonment.

A building is to be deemed complete, within the meaning of the statute relating to the liens of mechanics and materialmen, upon abandonment by the contractor when the building is substantially but not entirely completed and the owner takes no steps to complete it.

OPINION OF THE COURT BY PERRY, J.

This is an action of assumpsit upon three promissory notes amounting in the aggregate to \$1216.60. Judgment was for plaintiff against the principal defendant for the amount claimed and against the garnishee for \$622.50. The defendant does not appeal and the only question presented by the exceptions of the garnishee is whether the judgment against her can stand.

The defendant entered into a written contract with the garnishee whereby he agreed to build for her, on land conveyed to her as a part of the same transaction, a dwelling-house in accordance with certain specifications, to furnish all necessary material and labor and to "suffer no liens of mechanics and materialmen to attach to said house or premises." The garnishee in turn agreed to pay to defendant \$877.50 for the land and

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\$2222.50 for the building, a total of \$3100, in installments as follows: "forthwith the sum of \$500, \$2100 when house is complete, balance of \$500 * * * within 30 days after acceptance of house." This was on February 21, 1912. On March 7, 1912, the erection of the building had so far progressed that the garnishee, with the defendant's acquiescence, entered into occupation of it. The defendant, however, continued thereafter the construction of the building, the last work being done prior to July 4, 1912. Both before and after the commencement of her occupancy the garnishee repeatedly complained to the defendant with reference to certain alleged imperfections in the building, four of which have not at any time been remedied. These are: the use in the flooring of some boards of "slash grain" in place of "straight grain" as required by the specifications; improper laying of the floors, resulting in their "giving" in places under a person's weight; the failure to "finish" and varnish certain walls; the failure to drive together some boards (tongue and groove) in a wall; the failure to properly fit two windows in their casings; and the substitution of an inferior door-lock for a "Yale" lock.

From time to time the garnishee paid to defendant the whole amount required of her by the contract excepting the sum of \$622.50 which is still unpaid. This action, with its process of garnishment, was commenced on August 10, 1912, on August 24 Allen & Robinson, Limited, claiming \$1111.47 for materials furnished by the corporation to the defendant and used in the building, filed a notice of lien on the building and land and two days later an action to enforce the lien was instituted.

On behalf of the garnishee two grounds are urged for setting aside the judgment, first, that the building has not been accepted and that in consequence she is not indebted to the defendant and, second, that the defendant did suffer a lien, that in favor of Allen & Robinson, Limited, to attach to the property and that for this reason she is not indebted to the defendant and

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may, further, under R. L. §2178, retain the amount if it is due to the defendant in order to apply it in satisfaction of Allen & Robinson's claim. The findings of the trial judge upon these points were as follows: The court "holds the garnishee liable to respond to the plaintiff in the amount due under the contract between Mr. Dondero and herself which after deducting all payments made amounts to \$622.50 less certain items which the court finds were not waived by the garnishee at the time of taking over of the building; in other words, that there has been an acceptance of the building conditional upon certain items being made good owing to defective workmanship, the value of which I place at \$100. The court also finds that the building was complete on the last day on which the work was performed by the servants and employees of Dondero in the construction of the building in question. The court further finds that the lien which has been referred to by the attorneys for the corporation of Allen & Robinson, who responded to the order of the court to show cause, was not filed in the statutory time and therefore does not constitute a lien upon the structure." The findings that certain defects of construction have not been waived by the owner and that the cost of remedying them would be \$100 are amply supported by the evidence and it may be assumed that the language of the decision is capable of being construed as a finding that there has not been an acceptance of the building, a finding apparently required by undisputed evidence. Upon the question of law as to whether in cases of building contracts such as this the builder can recover compensation if his performance has not been complete in every detail, the authorities are in conflict. The more reasonable rule, that which is more in accord with justice and which, perhaps, is supported by the weight of authority, seems to us to be that where, as in the case at bar, the structure has been completed in accordance with the specifications excepting only as to slight or unimportant defects which have crept in undesignedly and are capable of being remedied at a comparatively small, ascertainable cost, and

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the building is not unfit for the use for which it was intended, the builder has a right of action against the owner for the unpaid balance of the contract price less the sum which it will cost to remedy the minor defects. In other words, substantial performance of the entire contract is sufficient. In *Pinches v. Swedish Lutheran Church*, 55 Conn. 183, 187, referring to the contention that "no recovery can be had for labor or material furnished under special contract, unless the contract has been performed, or its performance has been dispensed with by the other party" the court said: "The hardship of this rule upon the contractor who has undesignedly violated his contract, and the inequitable advantage it gives to the party who receives and retains the benefit of his labor and materials, has led to its qualification; and the weight of authority is now clearly in favor of allowing compensation for services rendered and materials furnished under a special contract, but not in entire conformity with it, provided that the deviation from the contract was not wilful, and the other party has availed himself of, and been benefited by, such labor and materials; and as a general rule the amount of such compensation is to depend upon the extent of the benefit conferred, having reference to the contract price for the entire work." To the same effect are: *Liggett v. Smith*, 3 Watts (Pa.) 331; *Smith v. School District*, 20 Conn. 312, 318; *Jones v. Davenport*, 74 Conn. 418, 420; *Rose v. O'Riley*, 111 Mass. 57, 59; *Cullen v. Sears*, 112 Mass. 299, 308; *Beha v. Ottenberg*, 6 Mackey (D. C.) 348, 351; and *Shepard v. Mills*, 173 Ill. 223, 228. The provision in the agreement that the final payments were to be made "when house is complete" and "after acceptance of house" does not render the principle inapplicable. The reasons for the rule still apply. Whether the defects in a given case are substantial or unimportant is a question of fact for the trial court. *Pitcairn v. Philip Hiss Co.*, 113 Fed. 492, 496; *Jones v. Davenport*, *supra*. In the case at bar the court evidently found that they were unimportant and that the contract was substantially performed

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and it cannot be said as a matter of law that it erred in so doing.

Under our statute (R. L. §2174, as amended by Act. 97, L. 1909) a material-man's lien "shall continue for forty-five days, and no longer, after the completion of the construction * * * of the building" unless proceedings shall have been "commenced to collect the amount due thereon by enforcing the same." In *Lucas v. Hustace*, ante 119, 122, we remarked, obiter, that "perhaps it" (the building) "is to be deemed complete * * * upon abandonment by the contractor when the building is substantially but not entirely completed and the owner takes no steps to complete it." This is a correct statement of the law. "The owner's or contractor's abandonment of the work upon a building is to be deemed a completion of it for the purpose of the filing of mechanic's liens by subcontractors, material-men and laborers." 2 Jones, Liens, §1438. "It would be inequitable and unreasonable, and contrary to the spirit of the law, to hold that parties are absolutely barred of all rights to the lien law, where the work is permanently stopped or abandoned without fault of such parties. Such a construction would place material-men and laborers at the mercy of the dishonesty, fickleness, or misfortunes of the owner or contractor. I am of the opinion that, in case of the abandonment of the enterprise, the case would come fairly within the meaning of the term completion, so far as applicable to the rights of the parties not in fault, to file and assert their liens." *Catlin v. Douglass*, 33 Fed. 569, 570. "It appears that this building never was in fact completed, but it has been held by this court, and is certainly consistent with the spirit of the law, that, where the work is abandoned, parties entitled to a lien shall not be thereby deprived of their rights, nor prevented from enforcing them, but that when the work is abandoned the building shall be deemed completed, for the purpose of protecting their rights." *Chicago Lumber Co. v. Merrimack Bank*, 52 Kans. 410, 414. See also *Shaw v. Stewart*, 43 Kans. 572; and 27 Cyc. 139.

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In holding that the lien of Allen & Robinson "was not filed in the statutory time" the trial court doubtless had in mind the undisputed evidence that the latest work on the building was done before July 4, 1912, more than 45 days prior to the date of the filing of the notice of lien, and found that there had been an abandonment of the work by the defendant. Upon the evidence the findings cannot be disturbed and the law was correctly applied. It is not claimed that the property is liable to any other existing lien.

The mere fact that the action to enforce the material-man's alleged lien is still pending and undisposed of cannot operate as a defense in favor of the garnishee in this case. Had the garnishee asked for a continuance to await the result of that case perhaps it should have been granted; but no such request was made and the issue as to the existence or validity of the lien must be determined upon the evidence now before the court.

Upon plaintiff's filing, as he has offered to do, a remittitur in favor of the garnishee as to the sum of \$100 required to compensate her for the defects in the performance of defendant's contract, the exceptions will be overruled.

W. B. Lymer (*Thompson, Wilder, Watson & Lymer* on the brief) for plaintiff.

B. L. Marx (*Prosser, Anderson & Marx* on the brief) for garnishee.

Cummins v. Cummins, 21 Haw. 742.

KAPEKA M. CUMMINS, AND KAPEKA M. CUMMINS
AS EXECUTRIX OF THE LAST WILL AND TES-
TAMENT OF JOHN A. CUMMINS, DECEASED, v.
THOMAS B. CUMMINS, MATILDA K. WALKER,
JANE P. MERSEBERG, MAY I. KIBLING AND H.
CUSHMAN CARTER, AS TRUSTEE.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED NOVEMBER 10, 1913.

DECIDED NOVEMBER 14, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

TRUSTS—disposition of income—apportionment of taxes.

Under a trust, created by deed, "out of the net income * * * after payment of all taxes * * * to pay" to the grantor "the entire net income * * * for life," the taxes on the trust property for the year 1913 are not apportionable between the estate of the grantor, who died on March 21, 1913, and the remaindermen but are payable wholly out of the income that would otherwise go to the grantor.

OPINION OF THE COURT BY PERRY, J.

On October 1, 1896, a deed was executed by John A. Cummins as party of the first part, Kahalewai Cummins, his wife, as party of the second part, and Joseph O. Carter as party of the third part, whereby Cummins conveyed certain property to Carter in trust "to collect the rents, issues and profits arising or issuing out of the said trust estate and to manage and care for the same," with certain powers relating to changes in the form of the investments, and upon further trusts expressed as follows: "out of the net income of the said trust estate and of the property for the time being representing the same, after payment of all taxes and other necessary costs or expenses for the care and maintenance of said trust estate, to pay to the party of the second part, for and during the term of her natural life, * * * a monthly allowance of One Hundred and Fifty (150) Dollars, which said allowance is hereby made a preferred and first charge upon the net income of the trust estate, the balance

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of the said net income to be paid in quarterly instalments to the party of the first part for and during the term of his natural life, and from and after the death of the party of the second part, the entire net income of said trust estate shall be paid to the party of the first part for life, and from and after his death, the said net income shall be paid, share and share alike" to the children of the parties of the first and second parts. Kahalewai Cummins died "soon after the execution of the said trust deed" and John A. Cummins on March 21, 1913. The complainant is the sole devisee under and executrix of the will of John A. Cummins and in this suit prays for an accounting by H. Cushman Carter, successor to the original trustee, and for an order directing the trustee to pay to her all moneys in his hands "to which, under the provisions of the said trust deed, the said John A. Cummins was at the time of his death entitled."

At the trial it was stipulated by the parties "that the income from said estate on an average is from six to seven hundred dollars per month, except the months of June and November of each year in each of which months said income was increased to the extent of one thousand nine hundred dollars, rent from Waimanalo Sugar Company and the usual expenses were increased during each of said months to the extent of seven hundred and fifty dollars, the semi-annual rent paid to the Territory of Hawaii for the Waimanalo Lease"; that at the time of the death of John A. Cummins the trustee had on hand the sum of \$1674.23 derived from income; and that the taxes assessed against the property of the trust for the year 1913 amount to the sum of \$2471.16. The only question presented by the appeal is whether, as declared in the decree appealed from, the sum of \$1674.23 was properly applied by the trustee to the payment of the taxes or whether, as claimed by the complainant, the whole or a part at least of that sum should be paid to the executrix for the benefit of the estate of the decedent.

The contention on behalf of the complainant is that "the evi-

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dent intent of the provision in the deed of trust was that at the end of each quarter" the grantor "should receive what was on hand"; that "it was not intended that the trustee should hold the income until the end of the year, or until the taxes had been paid, or that they should be paid, contrary to custom, during the first quarter"; and that at least the taxes for the year should be equitably apportioned with reference to the date of the grantor's death and the resulting balance out of the sum of \$1674.23 be paid to the grantor's estate.

In this jurisdiction there is no statute providing for the apportionment of rents or annuities or of the expenses deductible from the gross income of trust funds; and at common law such apportionment was not recognized. 2 Perry, Trusts (6th ed.), §556; *Kearney v. Cruickshank*, 117 N. Y. 95, 98. The question involved is purely one of construction of the provisions of the instrument creating the trust. The language of the deed is clear. The income which is to be paid in part to the grantor during his wife's life and wholly to him after her death is only that which remains "after payment of all taxes" and other necessary expenses. Until the taxes are paid or provided for there can be no "net income." Property taxes do not accrue from month to month or at other stated intervals during the year but are imposed by law arbitrarily as of the first day of January of each year and become a fixed liability, and their payment is enforceable by suit, at least as early as the last day of January of each year. *Keola v. Maui Auto Co.*, 20 Haw. 575. Ordinarily, perhaps, taxes are not paid or their payment enforced, as to the first half, until May 15 of each year and as to the second half until November 15 of each year. Nevertheless the trustee's legal liability existed as early as January 31, 1913, and payment by him on or immediately after that date would have been in conformity with his duty imposed by statute. Under the circumstances the outlay for taxes cannot be apportioned between the grantor and the remaindermen, just as an expenditure for repairs made during the month of January, 1913,

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could not have been apportioned. In view of the provisions of the deed of trust there was no *net* income on hand at the time of the grantor's death and the contentions of the complainant cannot be sustained.

The decree appealed from is affirmed.

R. P. Quarles (*Andrews & Quarles* on the brief) for complainant.

I. M. Stainback (*Holmes, Stanley & Olson* on the brief) for the trustee.

JOSEPH S. FERRY v. HAKALAU PLANTATION COMPANY.

ERROR TO CIRCUIT COURT, FOURTH CIRCUIT.

ARGUED NOVEMBER 11, 1913.

DECIDED NOVEMBER 19, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

EXECUTIONS—officer's return.

A sheriff's return to an execution is not conclusive against a stranger to the proceeding in which the writ was issued whose rights are affected by it.

SAME—levy on growing crop.

Where an officer purporting to levy an execution on a growing crop of sugar cane merely read the writ to the execution defendant and posted the usual notices of sale in public places, but did not go to the premises where the cane was growing, did not see the property sought to be levied on, never obtained possession of it, and made no indorsement of the attempted levy on the writ until the return was made after the sale of the property, held, that no valid levy was made.

SAME—title of purchaser where levy invalid.

In order that a sheriff's sale of personal property taken upon execution shall vest in the purchaser a good title it is indispensable that a valid levy shall have been made.

Ferry v. Hakalau Plantation Co., 21 Haw. 745.

OPINION OF THE COURT BY ROBERTSON, C.J.

In an action of assumpsit upon two counts against the Hakalau Plantation Company the plaintiff, Ferry, claimed the sum of \$1875.54 for 448.729 tons of sugar cane alleged to have been sold and delivered to the former by the latter. Upon conflicting testimony the trial court found that the defendant did not purchase the cane from the plaintiff so that that point is not now open to discussion. The question was whether under the circumstances which will be stated the plaintiff was entitled to recover from the defendant the value of the cane. Undisputed facts developed at the trial were as follows: On July 24, 1907, one G. da Silveira, who was engaged in cultivating sugar cane upon Lot 32, Kaiwiki III Homesteads, entered into a planting agreement with the Hakalau Plantation Co. which the parties to the present action agree included a chattel mortgage on the crops of cane which were to be grown upon that lot by Silveira to secure advances agreed to be made by the plantation company; the agreement was not recorded; on March 11, 1911, Silveira executed and delivered to the plantation company a bill of sale of "all that certain growing crop of cane now standing upon my land at Kaiwiki Third, which said land is described as being 27.3 acres on Lot No. 32"; the consideration expressed in the bill of sale was \$1301.40 which represented the amount of Silveira's indebtedness to the plantation company on the date named; on April 11, 1911, an execution was issued by the district magistrate of South Hilo against the property of Silveira in an action brought against him by another party; pursuant to that writ a purported levy was made on the growing crop of cane on Silveira's land and the same was sold by the sheriff on June 5, to the plaintiff; thereafter the plantation company cut and harvested the crop; there were 448.729 tons of cane of the value of \$1875.54; the plantation company had advanced upon the crop the sum of \$2607.90. The bill of sale above referred to was not recorded, and the plaintiff contended

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that the testimony showed that it constituted merely a mortgage on the crop. The trial court found it unnecessary to decide the point. The court held that "the cultivation or harvesting of the cane upon Silveira's lot under the planting agreement or under the instrument of March 11th, 1911, whether the latter be in fact a bill of sale as its title indicates or a crop mortgage, constitutes possession of the crop by the plantation sufficient to defeat a subsequent attempted execution lien." Judgment was for the defendant. In this court several points were discussed in the briefs and at the argument, but at the conclusion of the argument counsel for the defendant stated that he would rest the case for his client solely upon the contention that there had been no valid levy under the execution and that the plaintiff therefore acquired no title to the cane by his purchase at the execution sale. It is assumed that the mortgage (or mortgages) though unrecorded created a valid lien upon the crop in favor of the mortgagee as against the mortgagor, and that an unrecorded mortgage, the mortgagee not being in actual possession, is of no validity as against a purchaser of the property at an execution sale if the levy and sale were made and possession taken in conformity with the law.

The return of the county sheriff to the execution, dated June 8, 1911, shows that "levy was made by W. A. Fetter, deputy sheriff of the county of Hawaii, on the 11th day of April, A. D. 1911, on the following property said to belong to Guilherme da Silva alias Guilherme Silveira, defendant, to wit: All the growing cane on Lot No. 32 of Kaiwiki 3rd Homestead, having an area of about 29 acres," etc. Over plaintiff's objection Fetter, the deputy sheriff, testified that upon receiving the execution he went to Hakalau, met Silveira there and read the execution to him; that he posted a copy of the notice of sale at the Hakalau store and another at the police station at Hilo, and gave another to a police officer with instructions to take it up to Silveira's lot; he testified further that he did not go upon the lot and, in fact, did not know where it was situated. Whether

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the police officer took the notice of sale to Silveira's land did not appear, and we think it would make no difference what the fact was since the posting of the notice by the police officer who did not have the execution in his hands for service would not constitute a levy by either the police officer or the deputy sheriff. Counsel for the plaintiff contend that the court below erred in allowing the defendant to go into the question of the title to the growing crop, and to attack the sufficiency or validity of the levy, and while they argue that the levy was properly and effectively made, they urge that if there was any irregularity in the levy the purchaser at the sale nevertheless obtained a good title to the property. These claims present for consideration the questions whether the defendant was at liberty to contradict the return by attempting to show that a levy was not in fact made, whether that attempt was successful, and whether a sale without a levy will give title.

Mr. Freeman, in his work on Executions, states the rule to be that "a return, as to the facts which the officer was required to state in it, is *prima facie*, but not conclusive, evidence for or against a stranger to the suit," and that the reason why the return is not conclusive against strangers whose rights are affected is that "in case it is false, they have no remedy by action against the officer, nor have they any right to control, amend, or vacate the return." 3 Freeman on Ex. (3rd ed.) Sec. 365. See also *Nall v. Granger*, 8 Mich. 450; *Stewart v. Duncan*, 47 Minn. 285; *Holt v. Hunt*, 44 S. W. (Tex.) 889; *Meherin v. Saunders*, 131 Cal. 681, 688. Pursuant to this rule which we believe to be well established we hold that no error was committed by the trial court in allowing the defendant to attack the sheriff's return in order to open up the question of the title to the cane.

As to the levy. What constitutes a valid and effectual levy upon a growing crop is not entirely clear. The decided cases contain a diversity of views on the subject. The general rule as to levies upon personal property is that "the property must

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be within the power and control of the officer when the levy is made, and he must take it into his possession within a reasonable time thereafter, and in such an open, public and unequivocal manner as to apprise everybody that it has been taken in execution." 17 Cyc. 1085. In *Everett v. Bolles*, 6 Haw. 153, Chief Justice Judd, after quoting the statute (now R. L. Sec. 1817) said, "It is an essential ingredient of a levy that the property levied upon be taken into the possession, care or guardianship of the officer. He must have the property in his power and control." But where the property levied upon consists of a growing crop which in the nature of things is not the subject of manual possession some relaxation or qualification of the rule would seem to be necessary, and the courts have so found it to be. In one case the court went so far as to say that "proper notification to the party and indorsement on the levy is all that is necessary." *State v. Fowler*, 42 Atl. (Md.) 201, 204. See also *Johnson v. Walker*, 23 Neb. 736, 744. We think such an extreme view is not sustained by reason or the weight of authority. A good statement of what seems to us to be a reasonable view of the matter is to be found in the case of *Bank v. Duff*, 77 Kan. 248, 16 L. R. A., N. S., 1047, where the court said, "It is necessary that an officer levying an execution upon personal property shall take such actual and exclusive possession as the nature of the property will permit. Constructive possession is not sufficient where actual possession is feasible. But actual possession of a field of standing corn is not practicable. * * * In the nature of things there cannot be a manual custody of that kind of property. If there be no bystanders an outcry of seizure would be futile. Therefore it is only necessary that the officer go to the premises, there do some open and unequivocal act which as nearly as practicable amounts to a seizure, and indorse the levy on the writ. In this case notification of the only execution defendant accessible, the going to the property, the posting of the public notice of seizure and possession at a conspicuous place in the presence of a witness and the in-

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dorsement on the writ were all the officer could well do, and these acts constituted a valid levy." See also 11 A. & E. Enc. Law (2nd ed.) 660; *Cupples v. Level*, 103 Pac. (Wash.) 430; *Throop v. Maiden*, 52 Kan. 258; *State v. Poor*, 20 N. C. 428; *Crisman v. Dorsey*, 12 Col. 567, 574. In the case at bar the officer made no attempt to seize the crop of cane, he did not go to the premises and never saw the property he was supposed to levy upon, nor did he post any notice on or near the premises to show that the crop had been taken into possession pursuant to the writ. He made no indorsement of the purported levy upon the writ until the return was made after the sale had taken place.

There is some conflict in the cases but the weight of authority is to the effect that in order that a sheriff's sale of personal property taken upon execution shall vest in the purchaser a good title it is indispensable that a valid levy shall have been made. 17 Cyc. 1078; 2 Freeman on Ex. (3rd. ed.) Sec. 274. The execution authorized the sale of only such of the property of the defendant in the action as the officer should levy upon, and it would seem necessarily to follow that as the sheriff never obtained possession of the property and it was never *in custodia legis*, his conveyance passed no title to it.

We hold that no legal levy was made, that the sale passed no title to the property, and that the plaintiff cannot maintain an action to recover the value of the crop from the defendant.

The judgment of the circuit court is affirmed.

J. L. Coke (*H. Irwin* and *A. G. Correa* with him on the brief) for plaintiff-in-error.

C. S. Carlsmith for defendant-in-error.

NOVEMBER, 1913.

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Y. IDETA *v.* S. KUBA.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED NOVEMBER 5, 1913.

DECIDED NOVEMBER 20, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

EASEMENTS—*statute of frauds.*

A way appurtenant to land is an easement—an interest in the land across which it runs—which under the statute of frauds, as well as at common law, may not be created by parol.

LICENSES—*parol license revocable.*

A parol license for a right of way over the land of the licensor, where no expenditures of money have been made or improvements constructed in reliance upon its assumed permanency and the *status quo* may be restored without loss to the licensee, may be revoked at the will of the licensor.

OPINION OF THE COURT BY ROBERTSON, C.J.

This is a bill for an injunction in which the complainant averred that he is the lessee of the land described in R. P. 1788, L. C. A. 3145, situate on the east side of the Pauoa stream, in Pauoa, Honolulu; that the respondent occupies land bordering on the west side of said stream and lying between the land of the complainant and a public highway which was constructed within ten years last past, known as the "Horseshoe Road;" that from time immemorial the land of the complainant has had access to a public road about twenty feet wide running along the west bank of said stream with the right to use the same for all purposes including the passage of wagons, the same being called the "old road;" that within ten years past, by mutual agreement between complainant and respondent, the latter closed up the old road leaving only a foot-path along the bank of said stream and as a consideration therefor gave to the complainant a new road about twenty feet in width over respondent's land for use for all purposes including the passage of wagons, which said new road ran in a straight line from said stream to said "Horseshoe Road;" that the complainant assist-

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ed in the making of said new road and paid money for its construction; that the new road since its completion has been used by complainant, and is the only means of access to his premises by wagon; that within the last month the respondent has closed and blocked up said new road and prevented the complainant from using it, and threatens to permanently close it up, at the same time keeping closed the old road except as to the said foot-path, all to the irreparable injury and damage of the complainant. In his answer the respondent admitted the existence of a public way along the west bank of said stream having a width of from three to six feet but denied that there was a wagon road at that place; denied the alleged mutual agreement whereby the old road was closed and a new way across respondent's land to the Horseshoe Road given to the complainant; and denied that he has closed up the new road except under the following circumstances: "That on or about the 1st day of May 1911, complainant requested respondent to allow said complainant the use of a road for his wagons across respondent's premises to the public highway, promising to pay respondent for said privilege, and that respondent did agree with said complainant to allow him to make such road across his premises and use the same for the express and stipulated payment of ten dollars and said privilege and license expired on the 31st day of December 1911. That thereafter and before the 31st day of December 1912, respondent notified complainant that he would not renew said privilege and license, in view of the damage done to his premises by complainant's wagon and cattle in passing over said road and closed up said road for the use of complainant's wagons and cattle and that said road was never intended by respondent to become a public highway over his, the respondent's premises, but was merely a license and privilege requested and paid for by said complainant, the term of which said license and privilege has now expired." The respondent moved for judgment on the pleadings but that point will be passed by.

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Of the averments in the bill of complaint that which referred to the complainant's having paid out money for the construction of the new road was not supported by any testimony. And we doubt whether the complainant proved by a preponderance of evidence that the old road was reduced in width and the new road opened pursuant to a mutual agreement between the parties. The fact probably was in accordance with the testimony of the respondent that he decided to reduce the old way to a foot-path in accordance with his understanding of its former condition, and to open a new road into his land for purposes of his own and regardless of the complainant's wishes or claims in the premises. However, we will assume that there was testimony tending to support a finding that the change was made partly at least because of the consent of the complainant to accept the substituted right of way in lieu of the old one. The evidence also shows that the new road which was made in March 1911 was opened into the land of the respondent mainly for the respondent's own purposes, and that such labor as was contributed by the complainant and his partner in the making of the road was given voluntarily. The complainant testified to having constructed a small bridge across the stream at an expense of about fifteen dollars but it does not appear that in so constructing it he relied entirely upon the new road being kept open permanently or that the bridge would not be useful otherwise.

The circuit judge held that "the complainant had a license from the respondent to travel over his land situate between the new road (meaning the Horseshoe Road) and the Pauoa stream subject however to revocation by the respondent upon the restoration of the privilege of travel previously enjoyed by the complainant and his predecessors in title along the Ewa (west) bank of Pauoa stream and over the land of respondent," and an injunction was granted against the respondent "to be dissolved when the complainant has been restored to the use of the privilege previously enjoyed by him along the Ewa bank of

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the Pauoa stream over the land of the respondent to the satisfaction of the court."

We are of the opinion that the decree should be reversed. The theory upon which the bill was drawn and which finds some support in the complainant's testimony was that a new permanent right of way for all purposes was by mutual agreement to be substituted for one which had theretofore existed along the bank of the stream. In this connection the respondent presents the contention that as the alleged agreement was upon the complainant's own testimony only orally made it is not enforceable and the complainant acquired no rights from it. It is evident that this contention must be sustained. The alleged oral agreement, if made, was an attempt to create a right of way over the premises of the respondent as an appurtenance of the land of the complainant. It is elementary that a way appurtenant to land is an easement—an interest in land—which under the statute of frauds, as well as at common law, may not be created by parol. 20 Cyc. 216; *Jones on Easements*, Sec. 80.

In this court counsel for the complainant argued that while the old right of way was an easement the new right of way is a license which is irrevocable so long at least as the respondent deprives the complainant of the use of the old road, and that the attempted revocation under the circumstances was without effect. In their brief they cite a great many cases in support of that point "that licenses may be irrevocable," including *Lopez v. Soy Young*, 9 Haw. 117, and *Dimond v. Macfarlane*, 11 Haw. 181. Those were suits for specific performance in which the question was raised whether the agreements were taken out of the statute of frauds because of part performance, and it was held in each case that the statute applied and the relief sought was denied. We think neither of those cases help the complainant in this case. There is much conflict of authority on the question whether and under what circumstances a license purporting to be of a permanent nature but orally given may not be revoked to the detriment of the licensee. We think

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it is not necessary to review the many cases on this subject which are cited in the appellee's brief, or to go into the consideration of the much discussed question, as in our opinion the case at bar does not fall within the class of cases in which the conflict has arisen. In the case at bar there were no expenditures of money made, or improvements constructed in reliance upon an assumed permanency of the license. What little assistance was rendered by the complainant in the making of the new road was voluntarily given, and if the old road existed as an easement of the description alleged in the bill and testified to by the complainant we find nothing in the record going to show that the complainant would be prevented in a proper case from insisting upon its being reopened. The record does not show that the *status quo* cannot be restored. We think the testimony showed quite clearly that the complainant had merely a license to use the new road across the respondent's land, though that testimony came mainly from the side of the defense. In our judgment the case presents an illustration of a simple parol license bare of any special or complicating features—a mere personal privilege—which under all the authorities is revocable at the will of the licensor. 1 Washburn, Real Prop. (4th ed.) 632; 25 Cyc. 645. We conclude that the respondent was acting within his rights in the premises when he revoked the license, that his right to revoke it was subject to no condition, and that the complainant failed to show that he was entitled to the injunction sought. The case is therefore remanded to the circuit judge with instructions to dismiss the bill.

J. A. Magoon (*N. W. Aluli* with him on the brief) for complainant.

L. Andrews (*Andrews & Quarles* on the brief) for respondent.

CONCURRING OPINION OF DE BOLT, J.

I am inclined to the view that the record shows that the new right of way is an executed license; but the great weight of authority is, as I believe, that neither the execution of the

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license, nor the incurring of expense, nor both combined, affect the right of the licensor to revoke. 18 Am. & Eng. Ency. Law, 2d ed., 1146; 25 Cyc. 647; *Pifer v. Brown*, 49 L. R. A. 497, 526; *Wood v. Leadbitter*, 13 M. & W. 838. I therefore concur in the conclusion reached by the other members of the court, that the case be remanded to the circuit judge with instructions to dismiss the bill.

HENRY C. HAPAI, G. W. A. HAPAI AND NELSON K. SNIFFEN *v.* MAY K. BROWN, ARTHUR M. BROWN, HER HUSBAND, BLANCHE WALKER, JOHN WALKER, HER HUSBAND, WALTER F. DILLINGHAM, ROBERT W. ATKINSON, AND HENRY WATERHOUSE TRUST COMPANY, LIMITED, A CORPORATION.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

ARGUED NOVEMBER 13, 1913.

DECIDED NOVEMBER 29, 1913.

ROBERTSON, C.J., PERRY, J., AND CIRCUIT JUDGE ROBINSON
IN PLACE OF DE BOLT, J.

JUDGMENTS—*construction—reference to other parts of record.*

If from the decree in a cause there be uncertainty as to what was really decided, resort may be had to the pleadings, the testimony, the findings and the opinion of the court.

IN.—*decree in partition—adjudication of title.*

Examined in the light of the pleadings, the evidence and the opinion of the court, a decree that the complainants in a suit in equity for partition "take nothing by the bill" is held to have been an adjudication that the petitioners had no title to certain land sought to be partitioned.

IN.—*res judicata—determination of title in equity suit for partition.*

The determination of the title to real estate by a court of equity in a suit for partition, made without objection by any of the

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parties and not appealed from, is valid and binding upon the same parties and their privies in a subsequent action involving the same land.

OPINION OF THE COURT BY PERRY, J.

In a statutory action to quiet title to the ahupuaa of Kaono-ulu on the Island of Maui instituted by the present plaintiffs in error the plaintiffs claimed certain undivided interests under the will of one Keaka. The trial court held that under the will the whole ahupuaa was devised in fee to one Paakuku under whom the defendants, now defendants in error, claim. On appeal this ruling was reversed, this court holding that the devise was to Paakuku and her brothers and sisters (the plaintiffs claiming under the brothers and sisters) as tenants in common. Ante, p. 499. Further proceedings were then had in the trial court. It was stipulated, as at the former trial, that "the plaintiffs claim title to the land described in the complaint herein through and under the children of Keaka, the sister of Hewahewa, the original awardee of the land in question, other than the daughter of said Keaka, namely, Paakuku, and that defendants claim title to said land through and under said Paakuku." The will of Keaka, dated February 12, 1850, was proven and evidence was introduced tending to show that by descent and by mesne conveyances the interests of the brothers and sisters of Paakuku had become vested in the plaintiffs. The defendants then announced that they claimed title to the whole land, first by virtue of a former judicial adjudication, second by descent and mesne conveyances and third by adverse possession and in support of their first defense offered in evidence a certified copy of the records of the supreme court in the case entitled Kahoiiwai et al. v. Paakuku et al. including as a part thereof a certified copy of a deed from Keaka to Paakuku dated March 11, 1868, purporting to convey the whole ahupuaa. The evidence was received against the objection of the plaintiffs. The defendants offered to introduce proof of their other defenses but the court, being of the opinion that the claim of *res judicata*

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had been sustained, declined to receive it. In rebuttal the plaintiffs offered, and the court refused to receive, Probate Record No. 1022, relating to the will of Paakuku, and a power of attorney by Paakuku to one D. P. Eldredge, dated February 11, 1875, both of which will be referred to later. Judgment was for the defendants.

The main question presented by the assignments of error is whether the defense of *res judicata* was successfully established.

The suit in equity was instituted in November, 1871. In their bill the complainants alleged that Keaka died on March 17, 1868, seized of the ahupuaa of Kaonoulu and other property mentioned; that complainants were children and heirs of deceased children of Keaka and that defendant Paakuku was likewise a daughter of Keaka; that after Keaka's death Paakuku went into possession of the ahupuaa jointly with the complainants and had continued in such joint possession until the filing of the bill, save as to a portion of the land which was sold by Paakuku; that on February 12, 1850, Keaka made a will which was admitted to probate on December 15, 1868; that by said will Keaka devised all her property "to all her heirs in common * * * and the said defendant Paakuku was made a quasi trustee of said estate, to hold it only for the use and benefit of all the heirs of the said Keaka"; that "regardless of the said trust" and without the consent of the complainants Paakuku on November 10, 1869, sold certain portions of the land so devised; that Paakuku had collected rents for the ahupuaa and had failed to account for them or for the proceeds of the sale of the land; that Paakuku had executed to one Wong Ko a lease of the ahupuaa "in fraud of the rights of" the complainants; that Wong Ko was "committing great waste and destruction upon the trees, timber, saplings and firewood growing" on the ahupuaa by cutting them and was thereby causing irreparable injury to the inheritance; that Wong Ko and Paakuku were "not able pecuniarily to respond in damages"; and that Paakuku had been "guilty of a breach of trust". The claim

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was set up in the bill that the plaintiffs and Paakuku were, with others, tenants in common of the ahupuaa under the will of Keaka. The prayer was that Paakuku be compelled to render an account of the rents and other moneys received by her from the land, that the acts of waste be enjoined, that a partition be ordered of all of the lands devised under the will of Keaka and that the deed and the lease executed by Paakuku be cancelled "so far as the respective shares" of the complainants "are concerned". Paakuku in her answer, while admitting the execution and probate of the will of Keaka, alleged that on March 11, 1868, Keaka "being moved thereto by love and affection and for the consideration of the sum of five dollars to her paid" executed and delivered to Paakuku a deed whereby she conveyed absolutely to her the land of Kaonoulu and other lands, and that "by virtue of the said instrument the title in the said lands vested in her absolutely for herself, her heirs and assigns forever"; denied that any of the complainants had ever had possession of any of the lands; claimed "the truth to be that from the time of" the deed "up to the present time, this defendant has held undisputed possession of the ahupuaa" and that certain of the complainants had resided on the land only by her permission; that the will "had no effect as regards this defendant touching the lands of Kaonoulu * * * by reason of the subsequent deed" of Keaka; and denied specifically the existence of any tenancy in common with the complainants.

On June 6 and October 6, 1873, evidence was taken before a master, evidently by consent of the parties, relating to the execution of the deed of Keaka on March 11, 1868, the grantor's physical and mental condition at the time and the other surrounding circumstances. At a hearing before the court on November 6, 1873, the attorney for Paakuku "asks that the testimony recorded and taken before the Master on the 6th of June and October 9th, 1873, be admitted." The minutes are silent as to any objection to the request and the transcript was presumably received for there are indications in the opinion of

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the court subsequently filed that the evidence was considered. Under date of October 1, 1874, the following minute appears: "The opinion of the court is that the petitioners have no title to the lands of Kaonoulu and Kaluapulu and so adjudge. There is no controversy about the title of the land at Wailuku and the petition for partition of that land is hereby granted and decreed accordingly." Two days later Chief Justice Allen filed his written opinion concluding in the words just quoted from the minutes and stating at length his reasons for his conclusion. On October 12, 1874, "the court order decree entered" and on the same day a decree, signed by the chief justice, was entered reading thus: "It is ordered, decreed and resolved by the court here that the said complainants take nothing by their Bill and that the defendants have and to cover their costs herein incurred."

On behalf of the plaintiffs in error it is contended that the decree does not on its face contain any adjudication that the complainants in the equity suit had no title and that it should be regarded as a dismissal of the bill on the ground of lack of jurisdiction to determine the issue of title; and further that in aid of its interpretation the remainder of the record cannot be referred to. It is now too well settled, however, to admit of doubt that if upon a plea of *res judicata* the judgment relied upon as constituting the former adjudication does not of itself declare with certainty the precise scope of the matters adjudged, resort may be had, in aid of its interpretation in this respect, to the pleadings, the opinion of the trial court, the findings of fact and the testimony. "It not being certain" from the decree "which was the precise point determined resort may be had to the proceedings to ascertain which of the two points was determined." *Rawlins v. Honolulu Soap Works*, 9 Haw. 496, 501, 502. In that case "the proceedings and the decision" in the former action were examined for the purpose stated. So, also, in *George v. Holt*, 9 Haw. 47, 48, the declaration, the answer and the transcript of the evidence were resorted

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to; and in *Polapola v. Carr*, 9 Haw. 466, 467, and *Nakookoo v. Noholoa*, 19 Haw. 679, the opinions furnished the necessary light. "It is elementary that if from the decree in a cause there be uncertainty as to what was really decided, resort may be had to the pleadings and to the opinion of the court in order to throw light upon the subject." *National Foundry v. Oconto Water Supply Co.*, 183 U. S. 216, 234. "The elementary rule is that for the purpose of ascertaining the subject matter of a controversy, and fixing the scope of the thing adjudged, the entire record, including the testimony offered in the suit, may be examined." *Washington Gas Co. v. District of Columbia*, 161 U. S. 316, 329. The findings of fact by a trial court "even if not conclusive as against all testimony, are certainly very persuasive evidence of what the court did in fact decide." *Last Chance Mining Co. v. Tyler Mining Co.*, 157 U. S. 683, 690. To the same effect are *Yates v. Utica Bank*, 206 U. S. 181, 183, 184; *Burthe v. Denis*, 133 U. S. 514, 522; *Russell v. Place*, 94 U. S. 606; *Davis v. Brown*, *Ib.* 423; *Hornbuckle v. Stafford*, 111 U. S. 389, 393; *Freeman on Judgments*, §273; and 23 Cyc. 1537 et. seq.

Reference to the remainder of the record leaves no doubt that it was adjudged in the equity suit that the complainants, the predecessors in interest of the present plaintiffs in error, had no title to the ahupuaa of Kaonoulū. The pleadings presented the issue as to the execution and the validity of the deed and as to the relative force and effect of the will and the deed. Evidence was taken as to the fact and the circumstances surrounding the execution of the deed. An examination of the written opinion shows clearly that the court found that the deed had been executed and delivered as alleged and that its execution was free from suspicion and ruled as matter of law that the deed was operative as a conveyance of the ahupuaa to Paakuku alone, that the will was not operative as a devise to Paakuku and her brothers and sisters and that, for these reasons, the complainants had no title. Chief Justice Allen, after

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reciting (6 Haw. 124) the substance of the pleadings and recognizing that the complainants claimed under the will and the respondent Paakuku under the deed and that "it was undoubtedly the intent of the testator that they" (Paakuku and her brothers and sisters) "should all have an interest in the property" (under the will), held that "a testator has a right to make or cancel it" (a will) "and there is no right which vests by it which disables the testator during her life from making a conveyance by deed," and that the presentation by Paakuku of the will for probate did not preclude her "from claiming under a different instrument". Referring to the complainants' contention that "the pretended deed of gift of the 11th of March, 1868, is not without grave suspicions of its execution and in its very terms is a fraud upon the other heirs", the court said that "fraud must be proved—suspicion is not sufficient" and that "in this case the circumstances favor the validity of the deed". The conclusion that "the petitioners have no title" to the land of Kaonoulou followed logically from these findings and rulings. And so did the decree that the "complainants take nothing." We find nothing in the record to support the view that the decree constituted merely a dismissal for lack of jurisdiction.

It is further contended that a court of equity is wholly without jurisdiction to try the title to real estate and that Chief Justice Allen's decree was consequently void. This objection is raised now for the first time. It was not raised in the equity suit. On the contrary, the trial and the determination of the issue of title was with the consent of the parties. Under the circumstances the objection to a trial of the title by the court of equity must now be deemed to have been waived. In *Kuala v. Kuapahi*, 15 Haw. 300, a suit in equity to quiet title where the entire controversy turned on the issue of adverse possession, this court held that "the mere fact that the title had not first been adjudicated at law cannot avail the defendant" and said: "It seems to be pretty well settled that, as it is variously expressed,

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although neither consent nor negligence will confer jurisdiction in equity where none really exists, yet, when the case is not wholly foreign to equity jurisdiction, when it is not on its face such that equity could have no jurisdiction over it, as, for example, an action to recover damages for an assault, or for a libel or slander, when the defect is a want of equity and not a want of power, when the objection is merely that a plain, adequate and complete remedy at law exists or that equity is without jurisdiction in the particular case merely for some special reason or the absence of some particular element, when equity is competent to grant the relief sought and has jurisdiction of the subject matter, when the case is not without traces of equity jurisdiction, the question of the alleged want of jurisdiction may be waived and will be deemed to have been waived if not raised until the case comes to the appellate court." In support of this statement of the law were cited several decisions, mainly from the supreme court of the United States, to which list may now be added the later case of *Beyer v. LeFevre*, 186 U. S. 114, 118. The decision in *Kuala v. Kuapahi*, *supra*, has not been overruled in *Ahin v. Opele*, 17 Haw. 525, *Kaneohe Rice Mill Co. v. Holi*, 20 Haw. 609, or *Brown v. Davis*, ante, 327, cited for the plaintiffs. In none of these cases was the objection waived in the trial court. In none of them is there any indication of an intention to overrule the *Kuala* case. In *Mill Co. v. Holi* the principle of the *Kuala* case is expressly recognized but held to be inapplicable. Some of the expressions in *Brown v. Davis* might, perhaps, if read alone be construed as a ruling that there is no inherent jurisdiction in equity to try the title to real estate but read with the remainder of the opinion and with reference to the facts then before the court it is obvious that the court did not intend to so rule. In that case, a suit for partition, the trial judge declined to grant a hearing until the title should be determined at law and this court affirmed the order appealed from. The effect of a waiver in the trial

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court was not considered and was not an issue in the case and the *Kuala* decision was not even referred to.

The equity case tried before Chief Justice Allen was not purely an ejectment bill. The complainants alleged that they were in possession, jointly with Paakuku, the latter claimed that such of the complainants as were residing on the land were there by her permission and the court made no express finding on the subject. The inference, if any need be resorted to, must be, in support of the validity and regularity of the proceedings, that the court found that the complainants were in possession. The suit was far from being "without traces of equity jurisdiction". It was alleged that Paakuku was a trustee, that she had committed a breach of the trust and that she had committed and suffered waste, and discovery and an accounting from her, an injunction against waste, and a partition of the lands were prayed for. The case was not "wholly foreign to equity jurisdiction." It was not "on its face such that equity could have no jurisdiction over it", but on the contrary presented on its face familiar subjects of jurisdiction in equity. Even if interposed *in limine* the objection could have been at most that equity was "without jurisdiction in the particular case merely for some special reason or the absence of some particular element", namely a prior adjudication at law of one only of the many issues involved. Moreover, it is inexact to say that there is any inherent want of power in a court of equity to determine an issue of title to land. "The determination of title to real estate is within the scope of the general jurisdiction of a court of equity." *Beyer v. LeFevre*, supra. "I may observe that the question which I have decided is one of law and not of equity, and that a partition suit being an exercise by the Court of administrative rather than contentious jurisdiction, it might not have been right that I should have dealt with it if any one objected. But no one did object, in fact; and I think that, under the circumstances, I do not go beyond the limits of my proper jurisdiction, and that I do what is best

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for the parties, by now deciding the case." *Burt v. Hellyar*, L. R. 14 Eq. 160, 166. See also 30 Cyc. 244; 16 Cyc. 128, 129; Freeman, Cotenancy & Partition, §502 and Bispham, Prin. of Eq., §849. "The reason for remitting the investigation to a common law court is one of policy and fitness, rather than of any inherent want of power in a court of equity; and hence, if chancery decides, and there is no reversal in a proceeding directed to that end, the result is not void, but must stand and be respected." *Wallace v. Harris*, 32 Mich. 379, 389. Another reason is that each of the parties concerned is entitled to a trial by a jury on the issue of title. *Whitehead v. Shattuck*, 138 U. S. 146, 151. It is likewise competent, however, for each of the parties to waive this right.

The record in the equity suit was properly admitted in evidence and shows a valid, former adjudication that the predecessors in interest of the present plaintiffs in error derived no title under the will of Keaka to the land described in the declaration in the case at bar. That adjudication is binding as against the plaintiffs in error and in favor of the defendants in error. *H. C. & S. Co. v. Wailuku S. Co.*, 14 Haw. 50.

In the power of attorney (February, 1875) offered in evidence by plaintiffs Paakuku is claimed to have recited that she took the land under the will of Keaka. There was no offer to prove that any one acted in reliance upon the declaration, if it was made, or was misled by it. The instrument alone did not tend to prove an estoppel. Probate Record No. 1022, *In re Estate of Paakuku*, was offered by plaintiffs "for the purpose of showing that in 1876 the children of Keaka did not regard the determination of the partition suit as decisive of their rights in the land in controversy and * * * all regarded the partition suit and determination thereof as of no binding force whatever". It is not claimed that in Probate Case No. 1022 any adjudication was had of the rights now under consideration. "The proceeding", it was stated in the offer of the record, "was never decided * * * and is still in abeyance." The views

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entertained by the children of Keaka concerning the validity and effect of the decree of 1874 would not, of themselves, affect the validity or effect of the decree.

The assignments of error are not sustained. The judgment is affirmed.

L. Andrews for H. C. Hapai and G. W. A. Hapai.

R. P. Quarles for N. K. Sniffen.

A. A. Wilder (Thompson, Wilder, Watson & Lymer on the brief) for defendants in error.

NETTIE L. SCOTT v. E. N. PILIPO AND E. K. PILIPO.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED DECEMBER 4, 1913.

DECIDED DECEMBER 11, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

LANDLORD AND TENANT—*failure of lessor to deliver possession—remedy at law.*

The lessor's failure to deliver possession to the lessee, in so far as it is a violation of the lessor's duty under the lease, absolves the lessee from his obligation to pay rent and is available as a defense at law in an action for the recovery of the rent.

PLEADING—*inconsistent defenses.*

The defense of eviction from certain designated portions of the demised land and that of an entire failure to obtain possession of the remainder are not inconsistent.

Pleas are often entertained which cannot be reconciled with each other.

JUDGMENTS—*equitable relief against—defense available at law.*

A court of equity will not restrain the enforcement of a judgment at law upon a ground which was available to the complainant as a defense in the action and which was not presented as a defense merely through the choice or fault of the defendant at law unmixed with any fraud, fault or negligence of the plaintiff.

Scott v. Pilipo, 21 Haw. 766.

OPINION OF THE COURT BY PERRY, J.

On August 21, 1894, Esther N. Pilipo and her daughter Elizabeth K. Pilipo as lessors executed in favor of Nettie L. Scott, as lessee, a lease of "fifty-three (53) shares out of their fifty-six (56) shares undivided of the land of Holualoa in North Kona, Hawaii", (the land is further described in the instrument) with certain so-called exceptions and reservations. The lease was expressed to be for a term of thirty years from September 1, 1894, and the rent reserved was at the rate of six dollars "for each of said shares per annum" until the expiration (1907) of a lease, then outstanding, of a portion of the ahupuaa and for the remainder of the term at the rate of fifteen dollars per share per annum. From the commencement of the term and until at least March 1, 1900, the lessees paid the agreed rental. On July 5, 1901, the lessors brought a suit in equity, alleging that by its terms the lease was to become void upon non-payment of rent for thirty days after demand, that lessee had "wilfully refused to pay the rents * * * as they became due and have utterly refused to pay said rents * * * and have maliciously caused petitioners a great deal of trouble and expenses in the collection thereof by bringing suits in court" and that the lessee had repeatedly declared an intention "to make petitioners all the trouble and expenses that they could * * * in order that petitioners might be compelled to sell said premises," and praying that the lease be declared forfeited and be cancelled. The lessee resisted the attempt thus made to secure a termination of the tenancy, with the result that this court held that lessors had an adequate remedy at law and affirmed a decree dismissing the bill.

The rent was apparently further paid in full to March 1, 1902, for in April, 1906, the lessors commenced an action at law to recover \$1113, rent which had accrued under the lease for the period from March 1, 1902, until September 1, 1905. Trial was not had until March, 1912, the judgment of the court, jury

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having been waived, being for the plaintiffs for the amount claimed. Upon writ of error the judgment was affirmed. *Pilipo v. Scott*, ante 609. The lessee in that case had filed an answer of general denial but the only defense presented was that she had been evicted by the lessors from three comparatively small pieces of the hui land and had been thereby released from her obligation to pay any of the rent reserved and that an eviction had also occurred by reason of the lessors having interposed certain objections in a suit brought by Mrs. Scott in 1896 for the partition of all of the land of the hui.

This is a suit in equity for an injunction to restrain the lessors from enforcing the judgment last mentioned and from collecting any other sums as rent under the lease and for an order declaring the lease void and setting it aside. From decrees denying the lessors' motion to dissolve a temporary injunction and overruling a demurrer to the bill the case now comes to this court by interlocutory appeal.

The facts above recited are disclosed by the bill in which, in addition to its direct allegations, the complainant refers to the records in the action for rent, declares that they are "by reference incorporated herein" and prays "that the same be judicially noticed as if set out in full in the complaint." The records in the equity suit (1901) for cancellation of the lease had been received in evidence in the action for rent and are therefore to the same extent made a part of the bill. The same treatment is in the bill accorded to the records in the partition suit.

The allegations of the bill are somewhat detailed and lengthy but their substance may be briefly stated. While the complainant (lessee) confesses that she paid rent for a period of years, adding that she did so "relying on the expectation that she would secure possession by the partition proceedings", and further confesses, indirectly by the showing of the records in the lessors' suit to cancel the lease, that as late as 1901 she was unwilling to have the lease cancelled and desired the tenancy continued and says that upon the execution of the lease she "essay-

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ed to enter, by completing the boundary fences (walls), clearing away the guavas and otherwise exercising rights of possession" on the 71-acre tract referred to in our opinion in the action for rent (ante, 609), she alleges that she "was completely defeated in her attempt to enter or to secure possession of any part of the lands represented by the demised 53 shares and ever since has been kept from possession of all and every part of the land so attempted to be entered upon" (meaning evidently the 71-acre tract) and that "there was no other part of the hui lands upon which complainant could then have entered under the terms of said lease, without interfering with the proscribed rights set out in the terms of said lease, of other members of the hui." In other words, her complaint is that at no time since the execution of the lease has she been able to obtain possession of any of the demised property.

It is clear that ordinarily a lessee's failure to obtain possession, or a lessor's failure to deliver possession, in so far as it is a violation of the lessor's duty under the lease, absolves the lessee from his obligation to pay rent and is available as a defense at law in an action for the recovery of the rent. *Kaale v. Petero*, 7 Haw. 180; 18 A. & E. Ency. Law 325; 24 Cyc. 1145-1147; 1 Taylor Landlord & Tenant, §378. This rule is recognized by the complainant. To avoid its effect she claims in the bill and in argument, and no other excuse is advanced, that the defense was not available to her in the action at law "for the reason that defendant" (now complainant) "in good faith claimed to have been evicted and the defense of not having entered would have been inconsistent therewith", that the trial court found that there had been no eviction and that this court "held the finding of the trial court to mean that when defendant essayed to enter upon said block of 71 acres her effort had failed and that defendant had never been in possession of any part of said 71 acres" and refused to disturb the finding on the ground that there was evidence to sustain it. Concerning this contention we have no hesitation in saying that the trial court did not find

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that lessee had never been in possession of the 71-acre tract, or of any part of the ahupuaa other than the three comparatively small pieces above referred to, and that this court did not hold that the trial court did so find. The opinion filed by the lower court shows that the only defense there offered and considered was that the lessors "by taking possession of portions of the designated land" (meaning portions of the 71-acre piece) "and by sub-leasing other portions to a Japanese tenant" had been guilty of an eviction and that the only finding was that "there has been no eviction." The opinion leaves no room for the inference that the court found an utter lack of possession of any part of the demised property. This court, likewise, confined itself to a consideration of the sufficiency of the evidence, under the law, to support the finding that there had been no eviction with reference to the three small pieces of land within the 71-acre tract and of the soundness of the contention that an eviction occurred by reason of certain acts of the lessors in the course of the suit for partition. We held that there was evidence sufficient to support a finding that the lessee had not had possession of the three pieces specifically mentioned, but we did not consider the state of the evidence relating to any supposed absence of possession by the lessee of any other parts of the land. The judgment was affirmed because "the only defense relied upon" had failed of establishment. Ante 618. In saying that "the circuit court presumably took the view that the defendant had never obtained possession of the *area in question*" (ante 615) and that there was evidence to support the finding, reference was being made to the piece of land which was the only subject of discussion in that paragraph, to wit, the "land of the hui between the makai end of the kuleana and the Kai-lua road." (ll. 4 & 5, p. 615). Almost immediately following the sentence in which the words "the area in question" occur, are the statements that "possibly *the area here involved* was covered by the exceptions made in the lease of 'the houses, pine-apples and coffee planted by the lessors adjoining the new

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road' " and that "*the area* seems not to have extended all the way down to the road". These quotations show unmistakably that "the area" was simply a piece within the 71 acres and not, as the complainant contends, the whole tract and, of course, not the whole ahupuaa.

In the defense at law there was no claim of an eviction from all of the demised property. A defense of failure to obtain possession of the remainder of the ahupuaa would not have been inconsistent with that of eviction from the three small portions designated; and even a defense of failure to obtain possession of any part of the ahupuaa would not have been so inconsistent with that of the partial eviction mentioned as to render the two inadmissible at the same time. The practice in this respect is not as strict now as it was formerly. 31 Cyc. 147, 148; 16 Ency. Pl. & Pr. 570. Pleas are often entertained which cannot be reconciled with each other; and this is particularly appropriate in a jurisdiction where, as here, the statute liberally provides that under a plea of the general issue "the defendant may give in evidence, as a defense * * * , any matter of law or fact whatever." R. L., §1736.

Even assuming, however, that the two defenses were so inconsistent as to be inadmissible under the same answer of general denial, no cause exists for equitable interposition. No misrepresentation, deceit or other fraud on the part of the lessors is alleged in the bill. On the contrary it clearly appears that in the action at law the choice of defenses was wholly in the lessee's hands. The failure to avail herself of the defense of entire lack of possession was wholly due to her own choice or fault and is not attributable to any fraud, fault or negligence on the part of the lessors. Under such circumstances, it is well settled, equity will not enjoin the enforcement of a judgment at law. "A court of equity may only interfere with a judgment at law where 'the complainant has an equitable defense of which he could not avail himself at law because it did not amount to a legal defense or had a good defense at law which

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he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents.' " *Norris v. Herblay*, 9 Haw. 514, 515. To the same effect are *Mills v. Briggs*, 4 Haw. 506; *Hackfeld v. Bal*, 6 Haw. 364; *Atcherley v. Jarrett*, 19 Haw. 511; 2 Story Eq. Jur. §887; *Marine Ins. Co. v. Hodgson*, 7 Cr. 331; and *United States v. Throckmorton*, 98 U. S. 61.

The bill contains a prayer for the cancellation of the lease, but in support of the prayer no facts are stated other than those already considered.

The cause is remanded to the circuit judge with instructions to dissolve the temporary injunction and to sustain the demurrer and for such further proceedings, not inconsistent with this opinion, as may be proper.

M. F. Scott, by leave of court, and *J. W. Cathcart* for plaintiff.

E. K. Aiu and *N. W. Aluli* for defendants.

TERRITORY OF HAWAII v. MANUEL REIS.

EXCEPTIONS FROM CIRCUIT COURT, FIFTH CIRCUIT.

SUBMITTED DECEMBER 1, 1913.

DECIDED DECEMBER 13, 1913.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

SALES—delivery to carrier—general rule—title passes.

The general rule is, that where goods are delivered by the vendor in pursuance of an order to a common carrier for delivery to the purchaser, the delivery to the carrier passes the title, as the carrier is the agent of the purchaser to receive the goods, and the delivery to the carrier is equivalent to a delivery to the purchaser.

INTOXICATING LIQUORS—delivery by agent of vendees.

M. R. was employed by *R. & Co.*, wholesale liquor dealers in Honolulu, to solicit orders for liquor in the county of Kauai.

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The liquor was delivered by R. & Co. to a common carrier in Honolulu for shipment to the purchasers pursuant to their orders. M. R., while so employed by R. & Co., at the request and expense of the purchasers, received the liquor at the wharf on Kauai and attended to the delivery of it to the purchasers at their homes and places of business. He did not in thus receiving and attending to the delivery of the liquor violate any of the provisions of Act 119, Laws of 1907, as amended by Act 70, Laws of 1913.

OPINION OF THE COURT BY DE BOLT, J.

At the July term, 1913, of the circuit court of the fifth circuit, trial by jury being waived, the defendant, Manuel Reis, was convicted and sentenced to pay a fine of one hundred dollars on a charge that he did, on May 23, 1913, at Lihue, county of Kauai, "unlawfully distribute for sale certain intoxicating liquors * * * , he not having a license so to do, in and upon a conveyance then and there being driven along a highway * * * ."

There being no objection to the form of the charge we will assume that the charge is sufficient under Act 119, Laws of 1907, as amended by Act 70, Laws of 1913.

The defendant excepted to the conviction as being contrary to the law and the evidence. The case is now before us on this exception.

The trial court in its decision made the following findings: "The defendant, Manuel Reis, was an employee of Rosa & Co., a partnership doing business in Honolulu as wholesale liquor dealers under a license issued by the Board of License Commissioners of the City and County of Honolulu. As employee his duties were to solicit orders for intoxicating liquor on the Island of Kauai, to transmit these orders, which were written on order blanks furnished him by his employers, to them and to collect bills on Kauai. His instructions from his employers contained nothing on the subject of delivery and he had no authority to definitely accept orders. He kept no stock of liquors. In the regular course of business the final acceptance or rejection

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of an order was in Honolulu at the licensed place of business; there the order was entered up, a charge made against the purchaser for the liquor, the order filled and delivery made to the Inter-Island Steam Navigation Co., Ltd., of the ordered liquor, addressed to the purchasers. At times, however, persons objected to this form of delivery on the ground that it was inconvenient for them to go to the wharf in Kauai and asked defendant when he solicited their orders, if he would receive the liquor at the wharf and have it delivered to them. He agreed to this as an accommodation. He was never paid for such services by either Rosa & Co. or the purchasers. This case arises out of such occurrences. In transmitting certain orders to Rosa & Co. defendant told of the requests and his acquiescence and asked that the shipping receipts be sent to him and not to the purchasers. When the orders were filled in Honolulu, the liquor was delivered as usual to the common carrier, consigned to the purchasers, but the shipping receipts were not mailed to the purchasers but to the defendant with the bills. The defendant went to the wharf at Nawiliwili and received a barrel of beer consigned to a Japanese storekeeper of Nawiliwili and delivered it. (Some days later he collected the bill for this liquor and also the cost of the delivery from the wharf.) After delivering this beer he returned to the wharf and received another barrel of beer and seventeen casks of wine addressed to various persons and was in charge of this liquor on an express wagon about to deliver it when arrested. * * * It does not appear from the evidence that the consignees were informed by any one of the shipping of the liquor, or its arrival at Nawiliwili. The defendant stated in court that the liquor did not belong to the purchasers as it had not been delivered and that because the sale had not been completed he had not presented the bills. He has looked to Rosa & Co. to provide him with counsel, has refused to hire counsel himself and has not looked for help to the purchasers who requested him to make the delivery that has resulted in his arrest. The purchasers have not appeared and

claimed the liquor as would be natural and appropriate if they considered themselves to be the owners. Undoubtedly Rosa & Co. have intended to keep within the law. Soliciting orders is not part of a sale (Act 70 Laws of 1913), and the careful limiting of their agent's authority, the fact that the orders were sent to Honolulu, that it was decided there whether orders should be accepted or not, the keeping of all accounts in Honolulu and the practice of consigning shipments to the buyers and not to the agent, all show that it was planned to make sales only at the licensed premises in Honolulu. But the buyers dealt not with Rosa & Co. in Honolulu but with the defendant on Kauai. They made no request to Rosa & Co. to send shipping receipts to Reis. They did not send their orders to Rosa & Co. (though they were addressed to Rosa & Co. and on the printed forms furnished by Rosa & Co. to their agent) but handed their orders directly to Reis. Rosa & Co. sent them no bills or notice that the orders were accepted and filled, but sent bills to Reis with the shipping receipts. When the buyers objected to the proposed delivery in Honolulu and requested delivery at their homes or places of business on Kauai and the person to whom they gave their orders and to whom they expected to make payment, agreed to so deliver the liquor, I believe that the buyers considered this a part of their contract of sale. They paid nothing to Reis for his trouble and there was no reason why he should have done the favor except to facilitate a sale. When Rosa & Co. after consigning the liquors to the various purchasers sent the shipping receipts, not to the consignee but to defendant with the bills they retained control of the shipments. It became impossible for the purchasers to get the liquor purchased until the seller's agent delivered it. * * * In this case I find that the vendor retains their right over the goods and the title did not pass to the buyer in Honolulu upon delivery to the carrier. An acceptance of an offer made secretly in the bosom of a seller is not binding upon him. What was done on the books of Rosa & Co. and not reported to the consignees does not bind Rosa & Co. and the mere labeling of the goods when shipped in Hono-

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lulu I do not consider as a transfer of title when the shipping receipts and bills were sent to their agent Reis and no announcement of any kind was sent direct to the consignees. If Rosa & Co. had sent the shipping receipts direct to the consignees and left them to get Reis or any one else to bring the liquors from the wharf then Rosa & Co. would have lost control over them but as it is I find that title has not yet passed and I find the defendant guilty as charged."

The contention of the prosecution is, that Rosa & Co. retained possession of and control over the liquor until actual delivery to the purchasers, and that title did not pass until such delivery.

The defendant contends that the sale of the liquor was made in Honolulu, for the reasons, (1) that he had no power or authority to make a sale or offer for sale any liquor, (2) that all orders were subject to the acceptance or rejection of Rosa & Co., (3) that title passed upon segregation of the liquor from the common stock and delivery to the common carrier. And that no reservation of title was made by Rosa & Co., for the reasons, (1) that the liquor was consigned to the purchasers and delivered to the common carrier, (2) that the liquor was sold on credit, (3) that the orders were not C. O. D. orders, and (4) that the shipping receipts were sent to the defendant as the agent of the purchasers.

There is no evidence in the record tending to prove any of the following findings made by the trial court: That "the defendant stated in court that the liquor did not belong to the purchasers as it had not been delivered and that because the sale had not been completed he had not presented the bills;" that "he has looked to Rosa & Co. to provide him with counsel;" that he "has refused to hire counsel himself;" that he "has not looked for help to the purchasers who requested him to make the delivery that has resulted in his arrest;" and that "the purchasers have not appeared and claimed the liquor as would be natural and appropriate if they considered themselves to be the owners."

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Even though "the defendant stated in court that the liquor did not belong to the purchasers * * *," the statement was a mere conclusion.

As to the findings regarding the employment of counsel by the defendant and the failure of the purchasers to appear and claim the liquor, assuming these facts to be as found by the trial court, there is nothing in any of them tending to criminate the defendant. He had the right to employ counsel or not as he saw fit. Neither should the failure of the purchasers to appear and claim the liquor be taken as evidence against him. The motives with which the purchasers were actuated in no way concerned or involved the defendant. One charged with a criminal offense is only required to answer for his own acts, and not for the acts of others, or their failure to act.

It is true that "the buyers dealt not with Rosa & Co. in Honolulu, but with the defendant on Kauai," but they dealt with him as the duly authorized agent of Rosa & Co. in his capacity as solicitor of orders for liquor, and their contract for the purchase of the liquor was with Rosa & Co. and not with the defendant. When the purchasers "handed their orders to Reis," addressed as they were to Rosa & Co., they thereby sent "their orders to Rosa & Co." for the purchase and shipment of the liquor to them. And upon requesting the defendant to go to the wharf and receive the liquor for them and deliver it "at their homes or places of business on Kauai," they thereby constituted him their agent and impliedly authorized him to take all necessary and proper steps in the premises to obtain possession of the liquor, which, obviously, justified having the shipping receipts sent direct to him by Rosa & Co. It is clear, we think, that the defendant in making delivery of the liquor pursuant to this arrangement acted as the agent of the purchasers and not as the agent of Rosa & Co. The evidence did not warrant a finding to the contrary. The defendant in performing the services thus requested of him occupied a position in no way different from that of any other person whom the purchasers might have employed to perform the same work.

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The fact that the bills for the liquor were sent to the defendant is of no importance. This, doubtless was done as a mere matter of convenience. So long as the shipping receipts were to be sent to the defendant, why not send the bills to him also? The liquor, as the record clearly shows, was sold on credit and delivered to the common carrier in Honolulu for shipment to the purchasers on Kauai pursuant to their orders. Of course, there can be no question but that a sale may be as complete and title pass as fully, in consideration of a promise to pay, as by actual payment, if delivery is made, or other acts performed, sufficient to pass title. The general rule is, that where goods are delivered by the vendor in pursuance of an order to a common carrier for delivery to the purchaser, the delivery to the carrier passes the title, as the carrier is the agent of the purchaser to receive the goods, and the delivery to the carrier is equivalent to a delivery to the purchaser. Benjamin on Sales, 146, 633; 35 Cyc. 193; Newmark, Law of Sales, §§146, 226; *Abberger v. Marrin*, 102 Mass. 70. The facts disclosed by the record bring the case at bar clearly within this rule.

There is nothing in the record tending to show that payment was a condition precedent to actual delivery of the liquor, or that Rosa & Co., in addition to their common law right of stoppage *in transitu*, sought through the defendant, or otherwise, to retain control or dominion over the liquor after delivery to the common carrier, or that the purchasers "considered," or had any right to consider, the actual delivery of the liquor to them at their homes or places of business on Kauai as "a part of their contract with Rosa & Co." The record is clear that the only duties required of the defendant by Rosa & Co. were to solicit orders for liquor and to make collections. He had no power to bind them. They reserved the right to reject or accept any order. Thus, upon the acceptance of an order and delivery of the liquor to the common carrier in Honolulu for shipment to the purchasers on Kauai, the title, in the absence of any evidence of a contrary intention, passed from the vendors to the vendees,

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and the contract of sale was then complete. Rosa & Co. had nothing to do with the actual delivery of the liquor on Kauai. *U. S. v. Chevallier*, 102 Fed. 125; *De Bary v. Souer*, 101 Fed. 425; *Garbracht v. Com.*, 96 Pa. 449, 452; *Diversy v. Kellogg*, 92 Am. Dec. (44 Ill. 114) 154; *Tegler v. Shipman*, 11 Am. Rep. (33 Ia. 194) 118; *Kehrer v. Stewart*, 197 U. S. 60, 64; *Com. v. Farnum*, 114 Mass. 267, 270; Benjamin on Sales, Bennett's notes, 312.

While Rosa & Co. did not undertake the actual delivery of the liquor to the purchasers on Kauai, we do not wish to be understood as holding that they could not have lawfully made such delivery. That question, however, is not involved in this case. *Sarbecker v. State*, 65 Wis. 171; *Com. v. Ober*, 12 Cush. (Mass.) 493; *Com. v. Hess*, 17 L. R. A. (Pa.) 176.

The prosecution relies upon *Republic v. Hime*, 11 Haw. 18. In that case Hime was convicted of the offense of selling spirituous liquor without a license at Lahaina, where he was storekeeper for H. Hackfeld & Co., of Honolulu. He sent to Honolulu for a tub of sake for one Shimbo. Upon arrival of the sake Hime delivered the shipping receipt to Shimbo and received from him at the same time the price of the sake. Shimbo dealt solely with Hime and did not know Hackfeld & Co. in the transaction. He did not know where the liquor was to be obtained. The sale and delivery of the sake was, therefore, made in Lahaina, not in Honolulu; while the sale and delivery of the liquor in the case at bar was made in Honolulu and not on Kauai.

There being no evidence tending to show the alleged guilt of the defendant, the exception to the conviction is sustained, the conviction and judgment are set aside, and the cause remanded to the circuit court with instructions to discharge the defendant.

W. W. Thayer, Attorney General, and L. P. Scott, Deputy Attorney General, for the Territory.

E. C. Peters for defendant.

APPENDIX

In Memoriam.

IN THE MATTER OF THE PRESENTATION OF RESOLUTIONS ON THE DEATH OF THE LATE HONORABLE ALFRED S. HART- WELL.

On Wednesday the 4th day of September 1912, the Supreme Court was convened for the purpose of acting on the resolutions presented by the Bar Association of the Hawaiian Islands in memory of the late Alfred Stedman Hartwell, former Chief Justice of the Supreme Court, who died on August 30, 1912. On the bench were Chief Justice Robertson and Associate Justices Perry and De Bolt.

MR. F. E. THOMPSON: If the Court please, the Bar Association of the Hawaiian Islands, of which the late Judge Hartwell was an honored and loved member, ask leave to present the following resolutions:

WHEREAS, on the 30th day of August, 1912, **ALFRED STEDMAN HARTWELL**, a member of the Bar of the Territory and formerly an Associate Justice and recently the Chief Justice of the Supreme Court, was removed from our midst by the hand of death; and

WHEREAS, it is fitting that the Bar should place upon record an expression of its appreciation of the life and services to his country of our late brother; and

WHEREAS, the Bar of Hawaii has during more than forty years last past, recognized the sterling worth and integrity of our lamented associate, who came to us after a distinguished career on the mainland. A native of Massachusetts, of the best blood of New England, he was generously educated at the great university of that commonwealth. His services to his country began during the turbulent period of the late Civil War in which he twice enlisted in the union army where he served that cause with distinction and bravery, winning rapid promotion including that of brevet brigadier general for conspicuous gallantry in the field. After the close of the war, he entered upon the practice of his profession in his native state. Thereafter in the year 1868 he received an appointment by Kamehameha V as First Associate Justice of the Supreme Court of the Hawaiian Kingdom, which office he assumed soon after his arrival here about September 30, 1868.

He served with ability and distinction under two sovereigns, Kamehameha V and Lunalilo, resigning to accept the office of Attorney General in the first cabinet of Kalakaua, upon the election of the latter monarch to the throne of Hawaii, February 12, 1874.

He served but a few months in that office, retiring with the rest of the cabinet in May of the same year, when he entered upon active practice at the Hawaiian Bar.

In 1876 he was again called to the cabinet as Attorney General, in which office he continued until July 3, 1878, when the cabinet of which he was a member retired.

Resuming private practice at the Bar, Judge Hartwell continued actively in harness and won speedy recognition as a leader in his profession, so continuing until in the summer of 1883 he closed up his business in Hawaii and went abroad with his family expecting to there remain; but like many another both before and since that date, he found the lure of Hawaii so strong as to draw him back to the land of his earlier adoption.

From the time of his return in the year 1885, he continued in active practice until his reappointment to the Supreme Bench in 1904, as Associate Justice, in which position he continued until August 15, 1907, when having been promoted to the Chief Justiceship he assumed the duties of that office continuing therein until March, 1911, at which time owing to advancing years and indifferent health he voluntarily resigned from the bench.

The interval since his retirement was spent largely in foreign travel interspersed with periods of residence at his home in the city of Honolulu, which he had grown to love so well; and

WHEREAS, it is the unanimous tribute of the members of this Bar who have practiced either in association with, or in opposition to the late Judge Hartwell, or whose professional engagements have brought them into contact with him in his capacity as an Associate Justice or as Chief Justice of this Court that he has ever borne himself in those relations with a quiet unassuming dignity, unfailing courtesy, with a fine conception of the ethics of his profession, and of his duties both to the Bar and to the Bench.

In his relations toward the younger and less experienced members of the profession Judge Hartwell especially shone as a counsellor and a friend, and many of those now practicing at this Bar acknowledge with pleasure and gratitude the benefits derived by them from an association with him in his office as a practitioner:

THEREFORE, BE IT RESOLVED, that the Bar of Hawaii hereby gives expression to its sentiment of profound respect for the memory of him whose departure we mourn, and to its sense of the loss sustained not only by the Bench and Bar of Hawaii but by the Territory at large in the removal of one who throughout nearly half a century had given constant proof of his worth as a citizen, a lawyer and jurist; and

BE IT FURTHER RESOLVED, that a copy of these Resolutions be spread upon the records of this Court.

JUDGE S. B. DOLE: May it please your Honors and gentlemen of the Bar: In seconding these resolutions I desire to make some reference to Judge Hartwell's record in these islands, being myself a contemporary with him at about the time he came to Honolulu. In 1868, late in the year, he received his commission as Associate Justice of the Supreme Court, and took up the work of the court with I might say a great deal of enthusiasm. The court was in need of new blood at that time. John H had resigned, from old age, perhaps, and also Judge Davis. Judge Austin was filling one of the Associate Justice's places temporarily because his presence there was sorely needed.

Judge Hartwell came in and went to work. In the three years that he continued, a little over three years, he appears, from looking over the records,—the reports of the Supreme Court, to have taken up the brunt of the work of the court in banco, having written some fifty-five decisions during that time. Judge Allen was away part of the time on some official duty, diplomatic service perhaps; Judge Austin had a large private practice and only reluctantly went into the courts, and did not write decisions; Judge Widemann came in, following Judge Austin. Judge Widemann was not a lawyer; he was a good judge in evidence cases and wrote but few of the decisions; so it is very apparent that Judge Hartwell did the bulk of the work.

At that time the Supreme Court was a trial court, as well as an appellate court, attending not only to jury, equity, admiralty and chamber cases in Honolulu but to such cases all over the islands as a circuit department of its work, the judges taking turns in going to different circuits of the islands; thus we see that Judge Hartwell during his whole period of service in the Supreme Court must have been a very busy man. It was at that time that I commenced practice in Honolulu and even in my inexperience at that time I was able to perceive that Hartwell's work was good work. It was pleasant to me to practice before him; he was direct and simple in his rulings and his decisions; he was exact and pretty strict in the conduct of court matters, but attended to business. One always felt that no good point in the case was overlooked by him. One felt confidence, both in his integrity and in his ability. I feel that his work did much to improve the practice, both in the direction of simplicity and directness and promptitude. As the resolution says, Mr. Hartwell resigned at the time of the accession of Kalakaua and went into Kalakaua's cabinet as Attorney General. His first work as Attorney General was the trial of those Hawaiians who had participated in the election riots at the time Kalakaua was elected to the throne. As was the law at that time, these cases had all to be tried before Hawaiian juries, and I remember well Hartwell's handling of these cases through an interpreter,—new work for him,—appealing to the public spirit of these

Hawaiian jurors who were trying their own countrymen, in behalf of the supremacy of law in this country and the need of law and order as the foundation of civil government. I remember his appeal to the jury, in words something like this: "If citizens of this country may storm the legislative hall and mob the legislators whenever they are dissatisfied with their work, then good-by to all prosperity in this country and good-by to all security of private rights of property and of the person." Most of these cases resulted in convictions. There was no trouble of that kind afterwards for a long time. After a few months Mr. Hartwell left the cabinet; perhaps, the cabinet all resigned,—and went into private practice. He had at that time some want of confidence in his ability to make a living in private practice, strange as it may seem. I remember his telling me that he could live on \$1200 a year if necessary and that he felt he could earn that. His first work in private practice was in the police court. He got a retainer or two and went in there and he tried these cases with all the exhaustive study and attention to detail that you would expect anyone to give to a case in the Supreme Court in banco. It was a fine advertisement, attracted public attention, and with that and his record as Attorney General and on the bench he very quickly found himself with all the work that he could do and was even recognized here as the leader of the bar and long held that position. He was a lawyer of great resources; had a dogged determination to hold on to a case and win it, if possible, against all difficulties and obstacles. I remember a case he had which had gone to the jury and the verdict was against him. He went into a court of equity, and finally won the case. Of course that is not an unknown thing, but it is not a very common success.

There were some people who used to speak of Hartwell as cold and distant. It may be that his experience as a military officer created or developed in him some imperiousness, but I think that feeling in regard to him was the result of want of acquaintance, want of an understanding of his character. His temperament was reserved, but there were times, at the call of sympathy or public service, the voices of friendship and kinship, when all that reserve was swept away and he was found to have a warm and tender heart and a character that was ready to respond to public duty whatever the obstacle or danger that might lie in the way to it. There is a great deal that may be said in praise of our friend, but a man who has more than once volunteered in the military service of his country in her time of need, who had carried the scars of her battles to his grave,—a man who has been before this country in its public service with his record of an unblemished public and private life, such a man scarce needs the eulogy of any one. We can all say that he was a thorough gentleman, than which there perhaps can be no higher praise.

HON. ALEXANDER LINDSAY, JR.: May it please the Court and the Bar, in rising to second these resolutions I desire to say a few

words by way of expressing my veneration and regard for the memory of our beloved friend and brother who has answered the last call.

I knew Judge Hartwell for twenty-five years but I have been intimate with him only for the last ten years. As a youth I was inclined to look upon him with feelings of awe,—he had been a general in the Civil War, had been on the Supreme Bench, was a leader at the Bar. A closer acquaintance, however, with Judge Hartwell revealed a man of singular simplicity and sweetness of character. A few years ago I made a trip with Judge Hartwell to Chicago. It was shortly after the San Francisco fire and on our arrival there we could secure no sleeping accommodations in the hotel, neither could we get first-class sleeping accommodations on the trains. The first train to leave San Francisco was an emigrant train and we decided to go on that. In our car was a poor German family, who, having lost all their possessions in the fire, were migrating to the East to start afresh. The way in which Judge Hartwell conducted himself towards this poor family was a perfect revelation to me of the kindness of his character. He shared with them the fruits and delicacies that he had brought and sat for hours conversing with the aged grandmother of the family. I was astonished at that time, too, to hear how well he spoke German, how well he remembered his German. I cite this as merely one of many incidents or occasions in which I had the opportunity of observing how utterly lacking he was in ostentation and in foolish pride.

A few months ago as a committee of one from the Y. M. C. A. I requested Judge Hartwell to give this fall a series of lectures on legal subjects to young men in the Y. M. C. A. He readily consented to do so and expressed pleasure for what he called a great privilege of being able to do something for the young men. Of course his kindly interest in young men was proverbial, as so many members of this Bar who read law under him can testify.

To say that the death of Judge Hartwell is a distinct loss to this community and that his position will be hard to fill I think is no platitude. He was an ideal father, a brave soldier, an honest and upright citizen, a good and just judge, and an ornament to the profession he followed. He knew not what the word idleness meant, but each day strove to do the task that had been allotted to him and to do it well. Surely to none more fittingly than to him could come the Master's call, "Well done, thou good and faithful servant, enter thou into the joy of thy Lord."

MR. JOHN W. CATHCART: May it please this Honorable Supreme Court: On behalf of the Bar Association of these Islands I rise to second the proposed resolutions on the death of the Honorable Alfred S. Hartwell.

The second year has hardly swung to its last quarter since that day when, at the request of the Bar Association, I appeared before this Honorable Court to voice our regret and farewell on the retirement from his office of Chief Justice Hartwell. Today, on behalf of the

same body, I again stand in this presence, but now it is to bid our late Chief Justice the last, the long farewell of the living to the dead.

Slow, in beauty, moves the risen sun to its meridian, with it the stately hours march in equal step to its decline, and then with sudden sweep of darkness the night-time closes down and all the splendor and the glory of the day is done. No inapt symbol of the life of our lamented friend is our glorious tropic day. His youth beautiful in the glow and fervor of patriotism, his manhood and age strong and bright with honest purpose and high endeavor: so throughout the long day of his life he walked his way with lofty ideals and pure thoughts; vigilant and active in duty purposed and in duty done; yielding to no weakness but manful always, even when the shadows fell far toward the East, until like the tropic sun with undiminished brightness, the last hurried rush of time has borne him to the shadow and the silence of the grave. From our midst another loved and honored man has gone. We stand sorrowful, troubled, wondering. Today we are among our fellows; we see their kindly faces; our hands meet in the warm grasp of comradeship; our listening ear hears the sweet tones of sympathy. The morrow comes, but one comes not with it, nor shall return thereafter on any morning forevermore. And so we pass on, one by one, comrades of a season, friends of a lifetime, until all of us are gone and younger "generations tread us down." Yet memory gives back to the heart what our senses lose forever. Faces throng before us, that the eye cannot see, and, though the ear be deaf, we still can hear, out of the past, kind voices tell their tale of friendship, spoken long ago. So memory gives me back General Hartwell as I knew him. A man of strong vitality, his well-knit frame denoting vigor and energy, his finely modeled head evidencing the strength of his mentality; brusque, yet gentle; oftentimes in manner impatient, in his heart he was ever kind and forbearing; true and loyal in his friendship, he was helpful to others, and delighting in their companionship he was ever ready with advice and assistance to the younger members of the Bar. In a word, he was a noble, courteous gentleman. I met him late, when the active years of his life were drawing to a close and he was living largely in the days that had gone by. Finding in me some knowledge of our great Civil War, he was often pleased to speak of those stirring times and many an interesting hour have I listened as he told of battles and sieges, the long, hot, dusty march, the night bivouac under southern skies, the bugle call, the roll of drums, the sharp, fierce word of command, the deployment into line of battle, the crash of musketry, the thunder of the guns, and all the mad heart beat and wild passion of the war.

To me then, the jurist and statesman are merged in the soldier, the soldier who has passed to his eternal rest, with his sword by his side and enfolded in the flag of his country. He lived in the heroic period of our history and participated in the deeds that make men great. Fondly would his memory linger on comrades, who in the

springtime of life, fell willing sacrifices on the Altar of Liberty; and at times he almost questioned the fate which denied him that glory. But whether here and now, under the family roof-tree, with loving hands to close his eyelids down; or then and there, alone on a stricken field, beneath the pale stars, red with his mortal wound—what matters it? Everywhere and always the dead sleep well.

“The first hath no advantage. It shall not sooth his slumber
That a lock of his brown hair, his father aye shall keep.
For the last, he nothing recketh. It shall not his quiet cumber
That in a golden mesh of his callow eaglets sleep.”

In General Hartwell breathed the same high and lofty patriotism that inspired the gallant Shaw, when

“Right in the van,
On the red ramparts slippery swell,
With heart that beat a charge, he fell
Foremost, as fits a man.”

This verse of Lowell's graved on the Shaw Memorial was a favorite of General Hartwell's. Often have I recited it to him. I now can see his eye flash, the tightening of his hands and the deep quick breath as he repeated it back to me responsive. When he retired from the Bench I incorporated these lines in my address, knowing he would be pleased. Then he listened, heard and was glad. Today in loving memory of the dead, I again repeat them. But, alas, on the cold ear of death the words fall dull and heedless now. In his long, dreamless slumber he shall not hear or see or know. But high above the darkening valley the Bow of Promise spreads its glory on the sky and faith and hope insist to our despair that in some wondrous land beyond all mortal dreaming the dead are gathered there. Some wondrous land of rare and perfect beauty.

“Far, far from hence the Adriatic breaks in a warm bay
Amid the green Ilyrian Hills, and there
The sunshine in the happy glen is fair;
And by the sea and in the breaks the grass is cool,
The seaside air buoyant and fresh,
The mountain flowers more virginal and sweet than ours.”

In some such far distant land, fairer than the poet's vision, we trust and pray that we again shall meet our loved and lost; perchance they, listening, may hear sad cries of love tossed on the boundless air, but borne on winged winds to undreamed of havens on shores unknown; and that, from thence, upon our sorrowing, grief-bowed friends there now may fall, with peace and comfort, the solemn benediction of their dead.

MR. CECIL BROWN: May it please the Court and gentlemen of the Bar Association, in rising as one of the seconders of the resolutions presented by the Bar Association before your Honors, I do so as being, I think, the oldest member of the roll of practicing attorneys of this Court with the exception of one, who I believe is Judge Dole, and in seconding this I wish to bring to the notice of the Court that it has been my privilege for thirty-seven years to be acquainted and intimate with the late Judge Hartwell; that during that time he had extended, not only to myself but to all the members of the bar who were younger and needed help and direction what to do, his helping hand always ready to lead and show them and to instill into their minds the doing of right and the practice of law honorably and straight-forwardly. It has been my privilege to practice with him, to be opposed to him and interested with him in many matters, and always has he given that courtesy, that advice, that has made everything in the practice of law a recollection that is in a sense delightful. He was in this country when it was in a monarchical form of government and made his mark on the pages of history that will come downward and he has likewise since we became annexed carried forward what he thought was for the good and right of his people and of this country, and he has left a character and reputation and a standing that this community and all his immediate relatives may well be proud of, and it gives me pleasure, may it please the Court, to ask with the Bar Association that these resolutions be adopted and placed upon the records of the Court.

MR. CLARENCE W. ASHFORD: If the Court please and fellow members of the Bar, it is with feelings of peculiar emotion and regret that I arise to support the resolutions which have been read. It is impossible for one to have known Judge Hartwell as intimately as I have known him, during thirty years last past excepting a very few months, without being struck as by the shock of a personal loss in contemplating his departure from among us.

When January next shall arrive it will be thirty years since I landed upon these shores. Very soon thereafter, through the influence of friends and the kindness of Judge Hartwell, although as a matter of fact he did not require or need my services as I felt at the time, I was admitted into his office to assist as I might in his practice, which he was then attempting to close up in the prospect of leaving the country in a few months to go abroad and perhaps to remain permanently. I would willingly have left to my seniors in that relationship with him the expression of that feeling of aloha which we all, who have come into relationship with Judge Hartwell as members of his office staff have experienced, but with the exception, I believe, of his brother-in-law, Mr. W. O. Smith, I am the senior of those who have had the experience to which I allude, who is now in the Territory.

From the time of my first meeting Judge Hartwell until within a week of his death, when I met him on the street and congratulated

him upon his return from a short trip abroad looking so well and hearty that he promised to live a number of years yet in comparative good health,—from the earlier to the later date I never saw the day when I did not enjoy the reflection upon his friendship and his worth.

There have been expressions included in the resolutions and in the addresses of all who have preceded me here today concerning the courtesy and kindness of Judge Hartwell toward young and inexperienced members of the Bar. I was quite young in practice when I came to these Islands, and I arrived at a time which I found to be rather unfortunate for myself because of the peculiar legislative conditions, if I may so describe them, that then prevailed. At the session of the legislature which had closed but a few months earlier a less liberal policy with regard to naturalization had been adopted than had previously prevailed. Previous to that time it had been competent or possible to obtain Hawaiian naturalization upon very liberal terms and, I believe, without any definite length of residence. Under those conditions a number of American attorneys had come here, had obtained naturalization and thereby admission to the Bar; I think now of two of those, Judge Hatch and the late Judge Whiting; but by the time I arrived that condition was changed and it required a five years' residence to acquire citizenship, and citizenship was made a prerequisite to admission to the Bar. I therefore found myself in the peculiar, embarrassing and almost hopeless position of being apparently shut out from practice in the land to which my eyes had been turned for many years, and it seemed as though it would be necessary for me to retrace my steps if I would continue in the profession which I had chosen. But Judge Hartwell, with the energy and loyalty and fertility of resource for which he was noted, sought out another means of securing my admission, and attorneys who have read the fourth volume of Hawaiian reports will perhaps remember that there is there reported the decision of the Supreme Court upon my application for admission to the Bar under what is called the parity clause of the British Treaty. It is true that the court denied my application and decided that I was not eligible under that Treaty, and I certainly was not eligible from the ground of citizenship because I could not acquire it as the law then stood. Nevertheless, with a further exercise of that fertility of mind to which I have referred, Judge Hartwell resurrected, if that may so describe it, the then prevailing provision of the law whereby the King might grant letters patent of denization to foreigners, who should be thereby admitted to all the rights of citizenship without abjuration of their allegiance, and although it was found that some such letters had been issued in the earlier times of the constitutional monarchy, still it had fallen into disuse and been practically forgotten; nevertheless it was resurrected for my peculiar and particular benefit at the time, and the result was that through the intercession of Judge Hartwell and a number of other friends, sufficient influence was brought to bear upon the Cabinet and the King whereby I

was granted those letters of denization, which then rendered me eligible to admission to the Bar, and I was so admitted, nearly six months after my arrival.

During that time I had continued in Judge Hartwell's office, assisting him as best I might and in company with Mr. Thurston—if Mr. Thurston were here today I would very gladly leave to him the expression of these sentiments concerning the relationship between Judge Hartwell and his understudies, if we may so describe them, but business engagements have called him away and I am sure that I can say for him that one of the greatest regrets of his life will be to hear that Judge Hartwell has died and been buried during his absence and that he has not been able to be present nor express his tribute of respect.

In Judge Hartwell during those months I found all the urbanity and courtesy and kindness and justice, coupled with a somewhat frigid dignity, as it might appear to outsiders, that has been described by other speakers here before me, but that dignity to which reference has been made really constituted only an outer crust of reserve and to those who were so fortunate as to be able to penetrate beneath that outer crust the reward was indeed sweet and inviting. I felt and feel that I was speedily admitted to the confidence, the esteem and the affection of our lately deceased brother, and whatever vicissitudes intervened between then and now, differences upon matters political, etc., there has never been any abatement of my respect for him, and I am proud to believe that the same was true of him concerning me. At times when political conditions shook the community here, divided families, turned friendships into hatred, etc., still, those who had known Judge Hartwell, even though they may have differed from him, had never cause to complain of any injustice, any intolerance or any severity on his part.

As I regard the facts connected with the successive deaths of those who have graced our Supreme Bench, as well as others prominent in the community, I cannot help being impressed with the feeling that we are all hastening towards the same goal. Those of us who came here and were admitted to practice in our youth, full of all the aspirations and the ambitions and the hopes and desires incident to youth, we find that time has not been standing still with us any more than it stood still with our lamented brother. He was at the height of his physical and mental capacity at the time that I arrived here; he was in his middle forties, and it has been difficult for me to conceive and appreciate the fact, as advancing years stole upon him, that he was really becoming old, but those same influences operating and making themselves evident through our bleached hairs and the wrinkles that fasten themselves upon our features, remind us that, ride as we will, we cannot escape the pursuer who is relentlessly upon our track. We too must follow in our due time.

"Whether at Naishapur or Babylon,
Whether the cup with sweet or bitter run,
The wine of life is oozing drop by drop,
The leaves of life are falling one by one."

During my experience in Hawaii I have observed and lamented the deaths of no less than eight members of this exalted Bench,—Austin, Fornander, Preston, McCully, Judd, Bickerton, Whiting and Hartwell.

"And some we loved, the loveliest and the best
That from his vintage rolling Time has pressed,
Have drunk their cup, a round or two before,
And, one by one, crept silently to rest."

MR. A. S. HUMPHREYS: May it please the Court and gentlemen of the Bar: It is pleasingly illustrative of the kindlier feelings of the human heart and of the truth of the aphorism that "One touch of nature makes the world kin," that the old Latin motto, "*De mortuis nil nisi bonum*," has come to be regarded rather as the expression of a charitable custom than of magnanimous admonition—its original meaning.

In the presence of death all bickerings and enmities seem to fade away. Harsh thoughts and vengeful feelings, no longer find harbor in the breasts of the living, and we love to dwell fondly upon the good and amiable qualities, and the accomplishments of a friend or associate, who has obeyed the Master's last call.

It is true that Shakespeare has said: "The evil that men do lives after them, the good is oft interred with the bones;" but he aptly placed these words in the mouth of an accomplished and unscrupulous demagogue, who sought to arouse the vengeance of an assembled people against the murderers of their benefactor, by the intimation that even the virtues of their slain leader might soon be forgotten under the rule of his assassins.

We are thankful that we can truly say that the cases are rare indeed where the good deeds and honorable achievements of a departed friend do not outlive the modicum of weaknesses to which we must all confess. The example of an upright and useful life is not interred with the body. It lives and shines brighter and brighter unto the perfect day, the incentive and encouragement to how much good in the future, God alone can know. It was Lord Channing, I believe, who said, "Precept is instruction written in the sand; the tide flows over it and the record is gone. Example is graven on the rock; and the lesson abides."—It endures till—

"Time shall seek another sphere
And bloom in heaven's eternal year."

The death of the distinguished soldier, citizen and jurist, whose memory we are this morning assembled to honor, affords a striking illustration of what I have said. Who does not love to recall his virtues and his attainments? Who can think of his last request, that his body be carried to the tomb enfolded in the flag of his country and girded with the sword which he wielded so valiantly and which victory sheathed, without having his patriotism fired, and feeling that at the name of Hartwell he should reverently uncover? How the petty contentions and trivial misunderstandings and impatient words and temporary estrangements dwindle into insignificance in the awful presence of that remorseless fate that has left us today only the memory of Alfred S. Hartwell.

I, for one, can say from the bottom of my heart that I shall love to cherish the recollection of my associations with him, and that what was painful in them, due, of course, to no fault of his, is buried in the grave with him, to be remembered no more.

No one was ever quicker than Judge Hartwell to discern and atone for any passing slight or mortification unwittingly inflicted on others in the rush and hurry of forensic discussion; and, in spite of any impression that may prevail to the contrary, I know that he was ever ready to forgive those whom he believed to have wronged him, with a delicacy of magnanimity which left the offender without embarrassment.

Though learned beyond his fellows, and with a wonderful memory for adjudicated cases, he was a stranger to the sneer and flout and the arrogant assumption of superior wisdom too often found in connection with great talents.

His intellect was essentially clear and lucid. He was never cloudy, ambiguous or obscure.

Another characteristic of Judge Hartwell, as a lawyer, was his wonderful quickness of perception. State to him a proposition of law, a case for relief, and his mind at once grappled with it, flashed through all of the remote consequences and bearings, anticipated all objections, removed obstacles and arranged all of the details of an intricate and important proceeding.

Before ascending the bench, the judge, should, of course have had some experience at the bar, but it is better that the judicial function be assumed before advocacy has continued for such a period as to almost have become second nature. Whatever may be thought of Judge Hartwell's judicial temperament, it cannot be gainsaid that he occupied such an eminence of integrity and learning that his decisions commanded the respect and confidence of the bar and the community.

And now that he has passed away, that his dignified presence has given place to sorrowing absence, the memory of his virtues and his achievements will linger as evening clouds gild the horizon, when the sunset blushes for fear of what the night may bring.

The Clerk here read a letter from Mr. R. P. Quarles.

Mr. Chief Justice:

"Compelled to leave for Maui this morning, and unable to be present at the memorial exercises in honor of the late Chief Justice, Alfred S. Hartwell, I wish to add, in addition to the eulogies which will be delivered, a small tribute to his memory, and take this, the only course possible for me to do so.

"I am glad that I knew Judge Hartwell. When I came to the islands, in February, 1908, he was one of the few men that I met who seemed to feel an interest in me and in my welfare. The kindly words that I received from him touched a tender place in my heart and left an impression which is ineffaceable. I found him to be a scholarly gentleman, a sound lawyer, a jurist of high rank, and greatest of all, he impressed me as being one of nature's truest noblemen.

"The many decisions that he wrote which are reported in the Hawaiian Reports are the very best evidence of his ability as a jurist. And as so often happens, position, authority and power placed in his hands, did not turn his head, make him arbitrary, or cause him to be hypercritical.

"Judge Hartwell took a commendable pride in the efficiency and reputation of the Bench of this Honorable Court. He wanted to see it in the fore-front so far as being an authority on great questions of law are concerned. This pardonable pride, this intense interest in the success and good name of the courts of his country, is a trait which all judges should possess, tending as it does, to the elevation of the standards of Bench and Bar, and to the best interests of the people generally. I would like to say more. But these few, brief words, will show the esteem in which I held him, the affection that I entertained for him. I am, indeed, glad that I knew him, and felt that he was my friend; glad that I had the opportunity to love and admire him."

THE CHIEF JUSTICE: I fully concur in what has been said with reference to the high character, the strong character, the wisdom and ability of Judge Hartwell. He was a good Christian, a brave, patriotic and loyal citizen, an ideal husband and father, a kind and true friend. He was true to his profession and during his long career at the Bar and on the Bench he constantly maintained the highest ideals with reference to the practice of his profession and the administration of justice. What more could reasonably be expected of a man? What more could a man fairly expect of himself?

Judge Hartwell gained his greatest victory by making a success of life, and it may well be asked in his case, "O grave, where is thy victory?" The victory lies with him who, during a long life, successfully carried his burden to the end and finally in triumph laid it at the feet of his Maker.

Gentlemen of the Bar, the Court thanks you for presenting these resolutions. They will be spread upon the minutes of the Court.

RULES OF THE SUPREME COURT

In Force December 31, 1913.

(Other than rules relating to grand juries).

1. ENTRY OF CASES ON CALENDAR.

1. The clerk shall place upon the calendar each case brought to or pending in this court in its proper chronological order and forthwith give notice thereof to the parties.

2. If the necessary papers are not filed in this court within twenty days after the issuance of a writ of error, perfecting of an appeal or allowance of a bill of exceptions or such further time as may be allowed by this court or a justice thereof the appeal may be dismissed for want of prosecution. Failure of the stenographer to furnish a transcript of the evidence shall not excuse delay unless within ten days after the filing of the decree, judgment or verdict sought to be set aside the appellant shall have obtained from the lower court or judge a direction to the stenographer to prepare and furnish the desired transcript in the regular order of cases tried or in such other order as the court or judge shall direct, which direction may be conditioned on the appellant's making a deposit or giving security for the estimated cost of the transcript.

2. CALL AND ORDER OF CALENDAR.

1. Cases will be called for argument or trial in the order in which they stand on the calendar except as hereinafter provided or otherwise ordered. Sessions will be held beginning on the first Monday of each month during the term unless otherwise ordered.

2. If the parties, or either of them, shall be ready to proceed when the case is called, the same will be heard, unless otherwise ordered for good cause shown. If neither party shall be ready, the case may be postponed or go to the foot of the calendar, as the court may order.

3. If a case is called at two sessions, and upon the call at the second session neither party is ready to proceed, it may be dismissed unless sufficient cause is shown for further postponement.

4. Criminal cases, cases in which the Territory is concerned and which also involve or affect some matter of general public interest, cases once adjudicated by this court on their merits and again brought up, writs of habeas corpus and extraordinary writs, may be advanced by leave or order of the court.

5. Two or more cases involving the same question may, by leave or order of the court, be heard together, to be argued as one case or more, as the court may order.

6. Any case may, by filed stipulation, be submitted on briefs without oral argument at any time during the term, irrespective of its position on the calendar.

7. Except as aforesaid, no case will be taken up out of its order on the calendar or be set down for any particular day except upon special and peculiar circumstances to be shown to the court.

8. No stipulation or agreement of the parties to advance, pass or postpone a case, or to substitute one case for another, shall be binding upon the court. A case may be so advanced, passed, postponed or substituted only upon application made and leave granted in open court.

3. BRIEFS.

1. Within fifteen days after an appeal case has been placed on the calendar the appellant shall file a printed or typewritten brief and two copies thereof and a certificate of service of a copy thereof upon the appellee.

2. Within ten days after receipt of a copy of the appellant's brief the appellee shall file a printed or typewritten brief and two copies thereof and a certificate of service of a copy thereof on the appellant.

3. Within five days after receipt of a copy of the appellee's brief the appellant may file a brief confined strictly to matter in reply to the appellee's brief.

4. As to cases of reserved questions. In cases in which a single question has been reserved, the party maintaining the affirmative shall, for the purposes of this rule, be regarded as the appellant and his opponent as the appellee. So also where there are several questions and the one party has the affirmative as to all of them. Where several questions have been reserved as to which a party maintains the affirmative as to some of them and the negative as to others, the plaintiff (or petitioner or movant) shall be regarded as the appellant and the defendant (or respondent) as the appellee, unless, upon application to the court, a special order shall be made.

5. It will be a sufficient compliance with the foregoing provisions of this rule if the briefs are deposited in the mail, duly postpaid and addressed to the office address of the clerk or opposing counsel, as the case may be, in time to reach such address in due course of mail within the times limited in said provisions.

6. When, according to the foregoing provisions of this rule, an appellant is in default, the case may be dismissed; and when an appellee is in default, he will not be heard, except on consent of his adversary or on call of the court.

7. In cases brought originally in this court, briefs shall be filed on both sides at or before the argument, unless otherwise ordered by the court.

8. When evidence is referred to in a brief the page or pages on which it appears in the transcript shall be stated.

4. ORAL ARGUMENTS.

1. The appellant or, in original cases, the petitioner, shall be entitled to open and conclude the argument of the case; but when the questions on appeal arise solely upon demurrer, or otherwise solely upon the pleadings, the order of argument shall be the same as in the court below. When there are cross appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Not more than two hours on each side will be allowed for argument without special leave of the court granted before the argument begins.

5. REHEARING.

A petition for rehearing may be presented only within twenty days after the filing of the opinion or the rendition of judgment unless by special leave granted during such twenty days; and shall briefly and distinctly state its grounds, and be supported by certificate of counsel; and will not be permitted to be argued unless a justice who concurred in the opinion or judgment desires it. If the case has been remitted to the lower court it may be recalled.

6. MOTIONS.

1. All motions shall be reduced to writing. No facts will be considered unless shown by the record or by affidavit.

2. A copy of the motion shall be served on the opposite party not less than forty-eight hours before the hearing, unless otherwise ordered by the court.

3. The motion day shall be the first day of each stated session.

4. Any motion of which notice shall have been given to the clerk in advance, shall be entered on the clerk's list in the order in which he receives such notice, and shall have priority in that order before other motions.

5. Not more than half an hour on each side shall be allowed for argument of a motion, without special leave of the court before the argument begins.

6. There may be united with a motion to dismiss, a motion to affirm on the ground that, although the record may show that the case is properly before this court, it is manifest that the appeal was taken for delay only or that the question involved is such as not to need further argument.

7. TRANSCRIPTS OF EVIDENCE.
(Repealed).

8. APPEAL, ERROR AND EXCEPTIONS FROM CIRCUIT COURTS
AND CIRCUIT JUDGES.

1. On appeal, error or exceptions from a circuit court or circuit judge, no original papers other than bills of exceptions, transcripts of evidence and exhibits, shall be transmitted to this court unless by order of the court or a justice thereof. Original transcripts and exhibits may be returned to the circuit court or judge upon the determination of the case in this court unless otherwise ordered. Copies of papers shall be printed or typewritten and certified.

2. Bills of exceptions shall contain only such papers and statements as are necessary for the disposition of the questions of law raised by the exceptions. No papers shall be made a part thereof by reference unless specifically named.

3. In every case in which a proposed bill of exceptions shall be disallowed by a circuit judge and the establishment of the bill in this court shall be desired by the appellant, the record shall be composed of the same original papers and certified copies of papers and shall be transmitted to this court within the same time as though the bill of exceptions had been allowed by the circuit judge. The appellant shall, within ten days after the filing of the necessary papers aforesaid in this court, file a motion, supported by affidavit to the effect that all of the allegations of the bill are true and that the circuit judge refused to allow and sign the bill, asking that he may be allowed to establish the truth of the bill and that a time be set for a hearing on the motion. If the truth of the bill shall be established the bill shall be allowed. Failure to comply with any requirement of this rule shall subject the proposed bill of exceptions to removal from the files of this court.

9. WRITS OF ERROR.

Cases brought up by writ of error, as well as those brought up by appeal or bill of exceptions, shall retain the title of the case below without reversing the order of the names.

10. COSTS.

1. Attorneys shall be liable for costs of court incurred by their respective clients.

2. Bonds for costs on appeal to the Supreme Court shall be made to the Clerk of the Supreme Court, filed in the court from which the appeal is taken and forwarded by such court to the Supreme Court.

11. MANDATE.

1. Whenever appropriate upon the determination of a matter in this court a notice or mandate shall be issued to the court below informing that court of the proceedings in this court or directing further proceedings in that court as to law and justice may appertain. The notice or mandate may issue at any time on the order of the court or a justice thereof, but, unless otherwise ordered by the court or a justice thereof, it shall issue as of course after ten days from the rendition of judgment.

2. In criminal cases the clerk shall forthwith issue the mandate upon the form being approved by one of the justices.

12. PAPERS.

No paper shall be taken from the files of the court except by permission of the court or a justice thereof.

13. LIBRARY.

No book, pamphlet or magazine shall be taken from the library of this court, except for use in a court room within the Judiciary Building, without the written permission of a justice of this court. Any person violating this rule shall be liable to suspension from the use of the library and shall make good all loss.

14. APPEALS FROM DISTRICT COURTS.

District Magistrates in all cases in which appeals have been taken and perfected from them to the Supreme Court, shall forward without delay to the Clerk of the Supreme Court a certificate of appeal, stating the nature of the action, the decision made and the points of law upon which the appeal is taken; also, the summons or warrant, all vouchers and exhibits filed, or certified copies thereof, and a transcript of the testimony; also, all costs paid by either party to the action, with a clear and itemized statement showing by whom, and the purpose for which, each amount is paid, keeping back nothing but statutory fees and mileage, and stating explicitly what is kept back.

15. DEFENSE OF TITLE IN DISTRICT COURTS.

Whenever, in the District Court, in defense of an action of trespass, or a suit for the summary possession of land, or any other action, the defendant shall plead to the jurisdiction in effect that the suit is a real action, or one in which the title to real estate is involved, such plea shall not be received by the court, unless accompanied by an affidavit of the defendant, setting forth the source, nature and extent of the title claimed by defendant to the land in question, and such

further particulars as shall fully apprise the court of the nature of defendant's claim.

16. ADMISSION TO THE BAR.

1. Each applicant for admission to the bar shall file with the clerk an application setting forth his name, age, nationality, last place of residence, the character and term of his study, and, if he has been admitted to the bar of any other court, that he is in good standing. Sufficient certificates of the applicant's good moral character, and, if he is a member of the bar of any other court, the certificate of admission to such bar, shall accompany the application.

2. No applicant who is not a member of the bar of the highest court of some other state, territory or country, or a graduate of a law school of recognized standing, will be admitted to practice in this court unless he shall have studied diligently at least three years in a law school or the office of a competent attorney, or partly in such school and partly in such office, and shall have passed an examination which satisfies the court that his legal qualifications are sufficient.

3. If the applicant has been admitted to practice before the highest court of some other state, territory or country, or is a graduate of a law school of recognized standing, he shall be admitted here without examination as to his legal qualifications except that he may be required to pass an examination on local practice and statutory law.

4. No person who is not a citizen of the United States will be admitted unless he shall have bona fide declared his intention to become a citizen in the manner required by law.

5. No applicant whose application has been denied shall apply again for admission within one year thereafter.

6. Unless otherwise directed by the court regular examinations of candidates for admission to the bar will be held at Honolulu during the months of April and October.

17. DEFINITIONS.

Within the meaning of the rules of this court, whenever appropriate, appeal cases include cases brought up on bill of exceptions or writ of error, "appellant" and "appellee" include the plaintiff and defendant in error respectively; and "party," "appellant" and "appellee" and other words denoting the parties include their counsel.

18. ELECTION CASES.

Petitions by any candidate directly interested or by thirty voters of any election district, setting forth cause why the decision of any board of inspectors of elections shall be reversed, corrected or changed, shall be verified or supported by the affidavit of some person or persons having personal knowledge of the facts claimed to be ground for reversing, correcting or changing the decision.

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ABANDONMENT.

See MECHANIC'S LIENS, 2.

ACCOUNT STATED.

1. *Definition—promise to pay.*

An account stated is an agreement between persons who have had previous transactions, fixing the amount due in respect of such transactions. It is an acknowledgment of an existing condition of liability between the parties. From it the law implies a promise to pay whatever balance is thus acknowledged to be due. *Scott v. Hawaiian Tobacco Plantation*, 493.

See also CORPORATIONS, 2.

ACTION ON JUDGMENT.

See TAXATION, 2.

ADMISSIBILITY.

See EVIDENCE, 4.

ADOPTION.

1. *Agreement for—Act 83, L. 1905.*

If an agreement of adoption, by which the adopting parent "covenants and undertakes to give" the adopted child the same rights in her estate after her decease as though the child were her natural child, is not sufficient of itself to confer the right of inheritance, the statute (Act 83, L. 1905), gives the agreement full force and effect in that regard by clothing the adopted child with the right of inheritance. *Leialoha v. Wolters*, 304.

ADULTERY.

See DIVORCE, 8.

ADVERSE POSSESSION.

1. *Continuity of.*

In order to perfect title by adverse possession, such possession must be continuous for the whole period prescribed by the statute of limitations. Any break or interruption of the continuity of the possession will be fatal to the claim of the party setting up title by adverse possession. *Leialoha v. Wolters*, 624.

ADVERSE POSSESSION—Continued.**2. Break or interruption of continuity.**

Where, in an action of ejectment, the defendant relied upon the statute of limitations, and the evidence was, that the improvements on the premises were destroyed by fire; that the premises were then quarantined by the board of health; that during the quarantine the plaintiffs and the defendant were excluded from the premises; that from and after the removal of the quarantine the premises remained vacant, unenclosed and unused for a period of about two and one-half years, when the defendant resumed possession. Held, that the interval of two and one-half years which elapsed between the date of the removal of the quarantine and the date on which the defendant resumed possession of the premises constituted a break or interruption in the continuity of possession and was fatal to the defendant's claim of title by adverse possession. *Leialoha v. Wolters*, 624.

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AFFIDAVIT.

See ATTACHMENT; LANDLORD AND TENANT, 7.

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ANIMALS.**1. Sufficiency of application for impounding.**

An application for impounding twenty-seven head of cattle, wherein each animal is properly described on a printed blank, in a column intended for "a statement setting forth the number and species of estrays," which application is signed by the applicant at the bottom of the column reserved for that purpose and opposite the description of the animal last described on that page, is sufficient, and a compliance with section 5 of Act 125, Laws of 1907. *Correa v. Kapioho*, 532.

ANSWER.

See EQUITY, 2.

APPEAL AND ERROR.**1. Jurisdiction—void judgment—appeal therefrom.**

Where the district magistrate has not acquired jurisdiction of the person of the defendant and enters judgment against him by default, the judgment is void, and an appeal may be taken

APPEAL AND ERROR—Continued.

therefrom without a preliminary motion to set aside the judgment. *Gear v. Henry*, 101.

2. *Motion to strike—Denied when.*

It appearing that the appeal from a Commissioner to determine water rights has been duly perfected and that the record on appeal lacks only a transcript of the evidence and the exhibits, a motion to strike the record of the hearing and determination from the files of the Supreme Court is denied, and further time granted for transmission of the lacking papers. *Kaneohe Ranch Co. vs. Kaneohe Rice Mill Co.*, 173.

3. *New Trial—Order granting set aside when.*

Under R. L. Sections 1867 and 1630, the Supreme Court on Exceptions has the power to set aside an order of the lower court granting a new trial when the order is erroneous. *Wall v. Focke*, 406.

4. *Order denying motion to quash summons not appealable.*

An order of a district magistrate denying a motion to quash a summons is not a final order, or one which in effect determines the action, and, therefore, it is not appealable. *Gear v. Henry*, 54.

5. *Rehearing.*

Where a petition for rehearing contains or refers to no facts which would cause the court to reverse its decision, a rehearing will be denied. *Carty v. Jarrett*, 310.

6. *Second appeal—record.*

A previous appeal having been taken in the same cause, it is not necessary on a second appeal to duplicate the copy of the record of the lower court already on file in this court, which copy, together with a copy from the lower court of so much of the proceedings as have taken place since the cause was remanded on the first appeal, make a complete record. *Carey v. Hawaiian Lumber Mills Co., Ltd.*, 506.

7. *Transcript—Failure to file—Excused when.*

An appeal will not be dismissed for want of prosecution because of failure to file the transcript on appeal within twenty days after perfecting the appeal, where it appears that appellant did all he could to procure the transcript; but that the stenographer was unable to furnish it in time. *de Coito v. de Coito*, 250.

8. *When writ of error may be had—execution subsequently satisfied.*

Under Sec. 1869, R. L., "a writ of error may be had by any party deeming himself aggrieved by the * * *" judgment of any court, "except the supreme court, * * * at any time before execution thereon is fully satisfied, within six months from rendition of

APPEAL AND ERROR—Continued.

judgment;" and, where a writ of error is had at 2:05 p. m. and execution, which was issued at 11:45 a. m., is returned at 3:30 p. m. satisfied, the writ, notwithstanding the subsequent satisfaction of the execution, was properly had and the assignments of error may be examined. *Ting v. Born*, 638.

9. *Application for writ of error—prayer therefor.*

A writ of error in civil cases issues as a matter of right upon application to the clerk, by any party to the original cause or by any personal representative of a deceased party, and such application need not contain a prayer for the writ. *Ting v. Born*, 638.

See also DIVORCE, 10; EXCEPTIONS; PARTIES, 1; TRIAL, 3.

ARBITRATION AND AWARD.

1. *Jurisdiction—entry of submission as a rule of court—revocation.*

Under chapter 142, R. L., relating to arbitration, to give the court jurisdiction over the subject matter and the parties it is necessary that the written submission be entered as a rule of court; and until the submission is so entered either party may revoke the agreement, regardless of whether the award has been already placed on file. *Hilo Railroad Co. v. Rickard*, 375.

2. *Entry of rule of court, nunc pro tunc.*

In a proceeding under Chapter 142, R. L., a submission to arbitration may not, after revocation of the agreement by one of the parties, be entered as a rule of court, as of the date of the acknowledgment of the submission before the judge. *Hilo Railroad Co. v. Rickard*, 375.

3. *Judgment without rule of court.*

A judgment entered upon an award without the submission having been first lawfully entered as a rule of court is invalid. *Hilo Railroad Co. v. Rickard*, 375.

ASSESSMENTS.

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ASSUMPSIT, ACTION OF.

1. *Essentials—proof of breach.*

A breach of the promise declared on is of the essence of the action of assumpsit. *Scott v. Kona Development Co.*, 408.

ASSUMPSIT, ACTION OF—Continued

2. *Breach of promise—failure of proof.*

When in an action of assumpsit the allegation is that the defendant promised to pay a stated sum of money and neglects and refuses to pay the same or any part thereof and the undisputed evidence is that the defendant's promise was to execute certain promissory notes and to deposit them with a trustee as security for the payment of plaintiff's indebtedness to defendant in an unascertained amount and that all the parties agreed that the notes should not be delivered by the trustee to the payees until after the determination, by agreement, by arbitration or by judicial adjudication, of the amount of the plaintiff's indebtedness and that then such only of the notes should be delivered as were not consumed in the payment of that indebtedness, and the undisputed evidence further is that the defendant has performed all of his part of the contract in so far as the same is possible of performance until the due determination of the amount of the plaintiff's indebtedness and that the amount has not been ascertained in any of the methods prescribed, there is an utter failure of proof of the breach if not of the promise also, and a judgment of nonsuit may properly be entered. *Scott v. Kona Development Co.*, 408.

3. *Definition—breach of contract.*

A declaration for the recovery of damages for the non-performance of a parol contract to give plaintiff employment for a stated time at a specified compensation states a cause of action in assumpsit. *Braham v. Honolulu Amusement Co.*, 583.

4. *Evidence—Agency.*

In a suit upon a promissory note, signed by defendant, and claimed by defendant to have been without consideration, and to have been signed by him as agent for a corporation, the decision of the lower court finding that the note was given in payment of an open account against defendant personally, and was for a valuable consideration, is sustained. *Allen and Robinson v. Desky*, 511.

5. *Money had and received—money obtained by fraud.*

An action for money had and received will lie to recover money obtained by the defendant from the plaintiff by deceit. The law implies a promise by the defendant to repay it to the plaintiff. *Goo Yee v. Rosenberg*, 513.

6. *Defense that money was paid to another.*

One who has induced another to purchase opium by the fraudulent representation that the opium was lawfully imported and is a lawful subject of commerce and has by means of the representations obtained money from the purchaser, cannot set up in defense to a suit for the money so obtained by fraud that

ASSUMPSIT, ACTION OF—Continued.

he acted as agent for the United States and has paid over the money to his principal. *Goo Yee vs. Rosenberg*, 513.

See COSTS, 1; PLEADING, 1.

ATTACHMENT.

1. *Sufficiency of affidavit.*

The statute on attachment (L. 1909, Act 60) requires that the affidavit in support of the application for the writ show on its face that the indebtedness specified is "over and above all just credits and offsets." *Davis v. Mills*, 167.

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ATTORNEY GENERAL.

1. *Civil liability for official acts—application for order in excess of court's jurisdiction.*

The attorney-general of the Territory is not civilly liable in damages to a person imprisoned under an order made by a circuit judge at chambers in excess of his jurisdiction but in a matter within the general jurisdiction of the court over which he presides and issued upon application of the attorney-general supported by the latter's affidavit and presented in good faith, without the use of improper means and without improper motives. *Gomez v. Whitney*, 539.

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See HEALTH, 1, 2; MUNICIPAL CORPORATIONS, 1, 2.

BOND.

1. *Right of action—happening of contingency.*

In an action by the assignee of the executors of W. upon an undertaking to hold the executors harmless from a certain judgment, a request addressed by the executors to the plaintiff to pay the judgment being an essential element of plaintiff's case, it is immaterial whether the request originated with the

BOND—Continued.

executors or came from them by way of acceptance of a suggestion made by another. *Waterhouse Trust Co. v. Paris*, 200.

2. *Defenses—failure of contingency to happen.*

It is a good defense to such an action by the plaintiff that the payment of the judgment was not by the plaintiff or at the request of the executors but was by a third person purely in fulfillment of his duty under a separate and distinct written undertaking to hold the executors harmless. *Waterhouse Trust Co. v. Paris*, 200.

3. *Evidence—burden of proving happening of contingency named in bond sued on.*

In such an action the burden is upon the plaintiff throughout to prove the existence of all the facts which would cause the defendant's liability to accrue and includes the duty to prove, among other things, payment of the judgment under such circumstances that in accordance with the law the rights of the executors as against the defendant survived and were transferred to the plaintiff. *Waterhouse Trust Co. v. Paris*, 200.

See also EQUITY, 3, 4, 5.

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See ASSUMPSIT, 3; COVENANTS.

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CARRIERS.

1. *Bill of lading—presumption of ownership.*

The presumption of ownership of property arising from the possession of a bill of lading indorsed to the order of the holder may be explained or rebutted by other evidence showing where the real ownership lies. *Riverside Portland Cement Co. v. Von Haman-Young*, 727.

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See JUDGES.

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See LIMITATION OF ACTIONS, 3.

CONSENT TO JURISDICTION.

See DIVORCE, 2.

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See TAXATION, 7.

CONSTITUTIONAL LAW.

1. *Due process of law—assessment of taxes.*

A statute which requires persons to make returns to the assess-
or of their taxable property upon notice so to do and provides
that in case any person so notified shall refuse or neglect to file
a return of his property the assessor may make an assessment
thereon according to the best information within his reach
which assessment shall be binding and conclusive upon all
parties and shall not be subject to appeal, is not lacking in due
process of law in so far as it effects one whose failure to make
a return was due to contumacy or negligence. *Wilder v. Col-*
burn, 701.

2. *Fifth amendment—taking private property for public use
without just compensation.*

Chapter 83 of the Revised Laws, as amended, relating to the

CONSTITUTIONAL LAW—Continued.

improvement of lands which are in an insanitary or dangerous condition, or deleterious to the public health, is a health measure enacted in pursuance of the police power, and in providing that the work of improvement shall be done by and at the cost of the owner of the land, or, in case he refuses to act, by the government at the land owner's expense, and authorizing the sale of the land to satisfy the lien imposed thereon for the amount of the cost of the improvement and the expense of foreclosure and sale, does not constitute or provide for the taking of private property for public use without just compensation in violation of the Fifth Amendment of the Constitution. *Brown v. Campbell*, 314.

3. *Due process of law—notice and hearing.*

The provisions of said chapter, requiring the giving of notice to the land owner of the decision of the board of health as to the condition of the land and of the nature and extent of the improvement required, and allowing an appeal from such decision to a board appointed by the circuit court, whose decision shall be final, with the opportunity to the land owner to be heard before such board of appeal, held to constitute due process of law, notwithstanding such board is not empowered to compel the attendance of witnesses or to administer oaths to witnesses. *Brown v. Campbell*, 314.

4. *Delegation of taxing power.*

The provisions of said chapter held not to constitute a delegation to an administrative board of the power of taxation. *Brown v. Campbell*, 314.

5. *Seventh Amendment—right of trial by jury.*

In the proceeding provided for by said chapter the land owner is not entitled, under the Seventh Amendment of the Constitution, to a trial before a jury on the question whether his land is in an insanitary or dangerous condition or deleterious to the public health. *Brown v. Campbell*, 314.

6. *Invalidity of portion of statute.*

The invalidity of a portion of a statute will not defeat the whole act if the unobjectionable part is separable, complete and capable of enforcement. *Territory v. Hoy Chong*, 39.

7. *Police power—public fisheries.*

Sections 94 and 95 of the Organic Act have not reserved to Congress exclusive control over the sea fisheries of this Territory. The police power of the Territory with reference to the public fisheries has not been restricted so as to prevent the enactment of general laws respecting the means or methods by which fish may be taken and forbidding the use of certain kinds of nets. Act 156 of the Session Laws of 1913 held not to be

CONSTITUTIONAL LAW—Continued.

in conflict with said sections of the Organic Act. *Territory v. Makaiwi*, 633.

8. *Seventh Amendment—trial by jury.*

Section 1798 of the Revised Laws, providing that "the judge * * * shall in no case comment upon the character, quality, strength, weakness, or credibility of any evidence submitted, or upon the character, attitude, appearance, motive or reliability of any witness sworn in a cause; provided, however, that nothing herein shall be construed to prohibit the court from charging the jury whether there is or is not evidence (indicating the evidence) tending to establish or rebut any specific fact involved in the cause," does not impair the right of trial by jury, and does not contravene the Seventh Amendment of the Constitution of the United States. *Bannister v. Lucas*, 222.

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See TRUSTS, 1; WILLS; STATUTES, 2, 3.

CONSTRUCTIVE FRAUD.

See DEEDS, 1.

CONTEMPT.

1. *Disobedience of void order.*

A commitment for an alleged contempt which consists in the disobedience of an order made without jurisdiction is void. *Andrews v. Whitney*, 264.

See also PROHIBITION, 1.

CONTINGENT REMAINDERS.

See REMAINDERS.

CONTRACTS.

1. *Effect of illegality—parties in pari delicto.*

Contracts founded upon an illegal consideration or which contemplate the performance of that which is either malum in se or prohibited by some positive statute are void and one who has paid money in pursuance of such a contract will, after the contract has been performed and when the parties are in pari delicto ordinarily be denied the aid of the courts in recovering the money so paid. *Goo Yee v. Rosenberg*, 513.

2. *Effect of Illegality—parties not in pari delicto.*

Though both parties to the transaction are particeps criminis still if they are not in pari delicto the one less guilty will ordinarily not be denied the assistance of the courts. *Goo Yee v. Rosenberg*, 513.

3. *Malum prohibitum—where penalty on one party only.*

Where the law has prohibited the act of one only of the parties

CONTRACTS—Continued.

to a transaction, the one whose act is not prohibited is, when the offense is merely *malum prohibitum*, not in *pari delicto*. *Goo Yee v. Rosenberg*, 513.

4. *Unlawful intention on one side only, together with fraudulent representations.*

One who, desiring to act lawfully, is induced to purchase contraband opium by the fraudulent representation of the seller, believed and relied upon, that the opium was lawfully imported prior to the enactment of the federal act of February 9, 1909, is not in *pari delicto* with the seller and will not be denied relief by the courts. *Goo Yee v. Rosenberg*, 513.

5. *Evidence of modification.*

Where the undisputed evidence shows that W. employed T. in Chicago to perform as a singer in Honolulu for a period of twelve weeks at a stated salary, without any condition as to the theater or theaters in Honolulu at which T. was to appear, evidence that during a conversation between the parties in San Francisco, while T. was on her way to Honolulu under the contract, W. informed T. that she would appear at a theater operated by the H. A. Co. does not in itself justify a finding that the contract was thereby modified by the addition of a provision that T.'s performance would be at the theater so named. *Tyler v. Wise*, 148.

6. *Implied promise to pay—services rendered.*

When a person performs services for another on request or when one performs services for another, who accepts the same, the services not being performed under such circumstances as to show that they were intended to be gratuitous, a promise to pay for the services is implied by law. *Byrne v. Goo Wan Hoy*, 538.

7. *Substantial performance—right of recovery.*

When a structure has been completed in accordance with the specifications save only as to slight or unimportant defects caused by inadvertence or unintentional omissions and capable of being remedied at a comparatively small, ascertainable cost, and the building is not unfit for the use for which it was intended, the builder has a right of action against the owner for the unpaid balance of the contract price less the sum which it will cost to remedy the minor defects. *Lansing v. Dondero*, 736.

See also ASSUMPSIT, 3; PUBLIC OFFICERS, 1, 5, 7.

CORPORATIONS.

1. *Acts and admissions of agents.*

The acts and admissions of the agent of a corporation when acting within the scope of his authority are the acts and admissions

CORPORATIONS—Continued.

of the corporation. *Scott v. Hawaiian Tobacco Plantation*, 493.

2. *Authority of manager—account stated.*

The manager of a tobacco plantation owned by a corporation, who is authorized to direct all of its industrial operations and makes purchases for the corporation, has charge of all the laborers, makes contracts for clearing and cultivation, adjusts the amounts due to the laborers and contractors and directs the payments for labor and materials, has authority to enter into an account stated showing the amount due to a contractor. *Scott v. Hawaiian Tobacco Plantation*, 493.

3. *Appointment of officer, proof of.*

The appointment of an officer of a corporation may be proved by the testimony of the officer himself. *Fidelity Ins. Co. v. Henry*, 62.

4. *By-Laws—amendment or waiver of.*

A by-law of a corporation may be waived or set aside for the time being or permanently amended, without formal action, by a course of corporate conduct inconsistent therewith in which all the stockholders have acquiesced notwithstanding another by-law provides that all motions to amend the by-laws shall require a three-fourths vote of the shares of the company. *Horner v. Kukaiiau Plantation Co.*, 13.

5. *Change of date for annual meeting by acquiescence.*

A by-law provided that the annual meeting of the corporation should be held in the month of October, but following an informal agreement or understanding had between some of the stockholders present at a meeting held on June 5, 1902, the annual meeting thereafter was held in the last week of February of each year without protest or objection on the part of any stockholder. Another by-law provided that the officers should hold office for one year from their appointment and thereafter until the appointment of their successors. Held, that a stockholder whose stock was represented and voted at the annual meeting held in the last week of February, 1911, could not demand that an annual meeting for the election of officers be held before the last week of February, 1912, though he was not present at the meeting held on June 5, 1902, and now owns the majority of the stock of the corporation. *Horner v. Kukaiiau Plantation Co.*, 13.

6. *Proof of authority to institute action in corporate name.*

In an action by a corporation before a district magistrate it is not incumbent upon the plaintiff to prove affirmatively that the institution of the action was authorized by the corporation, and a failure so to do is not ground for non-suit. *Fidelity Ins. Co. v. Henry*, 62.

CORROBORATING EVIDENCE.

See EVIDENCE, 6.

COSTS.

1. *Assumpsit—attorney's commissions.*

In an action for the recovery of damages for the nonperformance of a parol contract to give plaintiff employment for a stated time at a specified compensation, attorney's commissions are, under R. L. Sec. 1892, taxable as costs in favor of the prevailing party. *Braham v. Hon. Amusement Co.*, 583.

2. *Attorneys' fees in assumpsit.*

Defendant's attorneys' fees under section 1892 R. L. are not taxable in an action of assumpsit in which judgment of nonsuit is entered for failure of proof. *Scott v. Kona Development Co.* 408.

3. *Mileage—witnesses not subpoenaed.*

Traveling expenses of witnesses not subpoenaed are not taxable as costs. *Scott v. Kona Development Co.*, 408.

4. *Witnesses' fees—expert witnesses.*

Sums paid for compensation of expert witnesses beyond ordinary fees authorized by statute for witnesses generally are not taxable as costs under section 1889 R. L., relating to "actual disbursements * * * deemed reasonable by the taxing officer." *Scott v. Kona Development Co.*, 408.

5. *Division of—in water rights cases.*

In a water rights case the costs accrued in this court on appeal from a ruling of the commissioner sustaining the demurrers of certain respondents may in the discretion of the court be divided, under the statute, in accordance with the circumstances of the case. *Kaneohe Ranch Co. v. Kaneohe Rice Mill Co.*, 280.

6. *Liability of sheriff for.*

In an action of replevin brought against a sheriff to recover property held by him under a writ of attachment issued in an action between private persons where the plaintiff obtains judgment the costs may be taxed against the defendant. *Carty v. Jarrett*, 277.

7. *Reference to master—transcript of evidence.*

A master appointed, with the consent of the parties, in a suit in equity for an accounting is entitled to compensation for his services and to an allowance for the cost of a transcript of evidence necessarily and reasonably incurred by him in the performance of his duty. The cost of the transcript may, in such a case, be taxed against the losing party. *Coldburn v. Long*, 428.

8. *Transcript of evidence.*

COSTS—Continued.

Money paid for a transcript of evidence necessary to the consideration of a bill of exceptions may be taxed as costs. *Tyler v. Wise*, 166.

9. *Preparation of record for review.*

Money paid to the clerk of the circuit court for comparing, certifying and typewriting the record on exceptions to this court may be taxed as costs. *Tyler v. Wise*, 166.

10. *Transcript of evidence—effect of stipulation.*

An expenditure for a transcript ordered by the opposing parties under an unqualified agreement, entered into by them that each would pay one-half of the expenses is not taxable as costs in favor of the prevailing party. *Scott v. Kona Development Co.*, 462.

11. *Prevailing party.*

Costs will be awarded in favor of a party whose exceptions to rulings allowing certain items as costs in favor of the opposite party are sustained, even though other exceptions to the judgment in chief do not prevail. *Scott v. Kona Development Co.*, 462.

12. *Unnecessary Papers.*

Expenditures incurred in the preparation and filing of papers unnecessarily made a part of a bill of exceptions are not taxable as costs of the appeal. *Scott v. Kona Development Co.*, 462.

See also EQUITY, 3, 5.

CO-TENANCY.

See LANDLORD AND TENANT, 3.

CO-TENANT.

See TENANCY IN COMMON.

COUNSEL FEES.

See EQUITY, 3, 5.

COUNTER CLAIM.

See PAYMENTS.

COURTS.

1. *Opinions—confession of judgment.*

The statutory requirement that in jury-waived cases the trial court's "decision shall be rendered in writing stating its reasons therefor" does not apply in a case in which the defendant confesses judgment for a specified sum and the plaintiff accepts the confession. *Carey v. Hawaiian Lumber Mills, Ltd.*, 311.

2. *Stare decisis.*

The court declines to reconsider the questions decided in *Nahaelua v. Heen*, 20 Haw. 372 and 613, nothing new or different

COURTS—Continued.

having been advanced in the way either of argument or authorities and the court being satisfied that the conclusion reached in that case was correct. *Boeynaems v. Ah Leong*, 699.

3. *Stare decisis—practice.*

Where a question of practice arising under statute has once been definitely decided it should and generally will be regarded as settled. *Wilder v. Colburn*, 701.

See also ARBITRATION AND AWARD, 1, 2; DIVORCE, 2; EVIDENCE, 8, 10; JUDGMENTS, 2; PROHIBITION, 1; STARE DECISIS; TRIAL.

COVENANTS.

1. *collection of rents—breach.*

The collection of rents payable in advance under the terms of the leases, at the times prescribed in the leases and prior to the assignment, is not a breach of a covenant, in an assignment of the leases, that "no rents reserved * * * have been collected * * * except such rents as are now due and payable pursuant to terms of the leases." *Gehr v. Breckons*, 602.

COVENANT TO REPAIR.

See LANDLORD AND TENANT, 1.

CREDIBILITY OF WITNESSES.

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CRIMINAL LAW.

1. *Plea of guilty—adjudication of guilt.*

Upon a plea of guilty an independent adjudication of guilt by the court is not necessary and the court may thereupon proceed to pass sentence. *In re Kim*, 295.

2. *Cumulative sentences—power of magistrates.*

District magistrates have power in proper cases to impose cumulative sentences. *In re Kim*, 295.

3. *Cumulative sentences—construction of record.*

A magistrate's record on pages 411 and 412, under date of April 28, 1911, contained entries in immediate succession of five separate charges against the same defendant and of a plea of guilty and a continuance in each case to the following day. On page 413 appeared entries in immediate succession of five separate sentences against the same defendant just referred to, each showing that the cause came by continuance from the preceding day. Held, that ordinary procedure and ordinary reading support the view that the cases were taken up for sentence in the order in which they were entered in the magistrate's record of April 28 and that in making the entries of April 29 the magistrate intended them to be read as referring to the cases in the

CRIMINAL LAW—Continued.

order in which the charges were entered on April 28. *In re Kim*, 295.

See also MUNICIPAL CORPORATIONS, 6.

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See DIVORCE, 3.

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See PUBLIC LANDS, 5.

CUMULATIVE SENTENCES.

See CRIMINAL LAW, 2.

DECEIT.

See ASSUMPSIT, 5, 6.

DEEDS.

1. *Undue influence—constructive fraud.*

A bill in equity to cancel and set aside a deed which alleges weakness of mind and body, fear engendered by the grantee, and lack of independent advice on the part of the grantor, and undue influence on the part of the grantee, but which does not set up gross inadequacy of price, is not demurrable for the want of equity. *de Souza v. Soares*, 330

2. *When deed not to be deemed fraudulent.*

Where a deed has been prepared by an attorney at the request of and in accordance with directions given him by the grantor and it has been executed by the grantor freely and voluntarily and delivered to the grantee without any misrepresentation having been made as to its contents, it will not be regarded as fraudulent because the grantor made statements both before and after its execution to others than the attorney which tended to indicate that she entertained an intention to make a disposition of the property different from that provided for in the deed, nor from the reason that the deed was not read by or to the grantor before its execution. *Wond v. Mikalemi*, 288.

See also FRAUDULENT CONVEYANCES, 2; PLEADING, 2, 3; TRUSTS, 3.

DE FACTO JUDGE.

See OFFICERS, 2.

DE FACTO OFFICERS.

See OFFICERS, 3, 4.

DEFAULT.

See MORTGAGES.

DELEGATION OF POWER.

See CONSTITUTIONAL LAW, 4.

DELIVERY.

See INTOXICATING LIQUORS; SALES.

DEVISES.

See EXECUTORS AND ADMINISTRATORS; WILLS.

DISPUTED TITLE.

See PARTITION.

DISTRICT MAGISTRATES.

See CRIMINAL LAW, 2, 3.

DIVORCE.

1. *Alimony—misconduct of wife.*

Upon a divorce granted upon the sole ground of the desertion of the wife the court rendering the decree is without jurisdiction to award alimony. *Andrews v. Whitney*, 264.

2. *Courts—jurisdiction—by consent.*

In such a case consent of the parties is ineffectual to give the court power to award alimony. *Andrews v. Whitney*, 264.

3. *Extreme Cruelty.*

Extreme cruelty, as a ground of divorce, implies physical injury either actual or apprehended. Personal violence need not be shown, but a state of unhappiness involving mental suffering which is not such as to impair the health does not amount to extreme cruelty. *Bruns v. Bruns*, 284.

4. *Extreme cruelty.*

Extreme cruelty, as a ground for divorce, implies injury, either actual or apprehended. Personal violence need not be shown, but the infliction of mental suffering is not a ground for divorce unless its actual or reasonably apprehended effect is injurious to the health of the complaining party. *Lyons v. Lyons*, 474.

5. *Neglect to provide suitable maintenance.*

Where a wife sues her husband for a divorce on the ground of neglect to provide suitable maintenance, she is not entitled to a divorce upon the evidence adduced, which shows that the home in which they live was paid for by the wife; that she has had a monthly income of about \$125; that the husband has no property or income other than a monthly salary of about \$100; that he pays the meat bill, the laundry bill, the yard boy, the taxes and the premiums on certain insurance policies, which practically consume his entire salary. *Lyons v. Lyons*, 474.

6. *Habitual Intemperance.*

Where a wife sues her husband for a divorce on the ground of habitual intemperance, and, while the evidence tends to show

DIVORCE—Continued.

that the husband indulged in the use of intoxicating liquor to a considerable extent, but that it was not such a frequent indulgence to excess as to show the existence of a confirmed habit and inability to control his appetite, such use is not ground for divorce. *Lyons v. Lyons*, 474.

7. *Evidence—preponderance—reasonable doubt.*

A suit for divorce is a civil case, and a libellant need only establish the grounds for a divorce by a clear preponderance of the evidence; the criminal law rule that guilt must be proved beyond a reasonable doubt being inapplicable where a spouse is charged with matrimonial misconduct *Lyons v. Lyons*, 474.

8. *Adultery.*

Under the circumstances as disclosed by the evidence the charge of adultery was proven. *Lyons v. Lyons*, 474.

9. *Extreme cruelty.*

To constitute extreme cruelty there must be such violence or such a course of conduct as tends to endanger life, limb or health, or creates a reasonable apprehension of such result, thus rendering continued cohabitation unsafe. The use of coarse and vile language and the giving of a single blow which caused no serious injury and created no reasonable apprehension of future danger to life, limb or health, there being some provocation and the complainant not being free from blame, held not to constitute extreme cruelty. *de Coito v. de Coito*, 339.

10. *Review of facts on appeal.*

On an appeal from a decree in a divorce case the entire record is brought up and this court will draw its own conclusions as to the facts from a consideration of all the testimony. In cases turning wholly or largely on the credibility of witnesses and the weight of evidence much weight will ordinarily be accorded the findings of the trial judge. *de Coito v. de Coito*, 339.

DOWER.

See RECORDS, 1.

DUE DILIGENCE.

See NEW TRIAL, 3.

DUE PROCESS OF LAW.

See CONSTITUTIONAL LAW, 1.

EASEMENTS.

1. *Statute of frauds.*

A way appurtenant to land is an easement—an interest in the land across which it runs—which under the statute of frauds, as well as at common law, may not be created by parol. *Ideta v. Kuba*, 751.

EJECTMENT.1. *Prima facie case.*

In an action of ejectment the plaintiffs make out a prima facie case by evidence of adverse possession which shows that title to the land in controversy was acquired by one from whom the plaintiffs take title by right of inheritance through their adopting parent. *Letaloha v. Wolters*, 304.

ELECTIONS.1. *Nomination papers construed.*

A nomination paper which is dated at Wailuku, Maui, in the second senatorial district, which recites that an election for senators for the second senatorial district has been ordered, and requests the addressee to be a candidate for "senator for the Territory of Hawaii," and nominates him as a candidate for "said position," and is signed by the required number of electors, all of whom are electors of the second senatorial district, and to which is appended a written acceptance and declaration signed by the addressee that he is "qualified to be a candidate for senator for the second senatorial district," is construed and held to be a request to and nomination of the addressee to be a candidate for senator for the second senatorial district of the Territory. A paper in general form similar to that above described purporting to nominate the addressee to be a candidate for "representative for the Territory of Hawaii," held to be a request to and nomination of the addressee to be a candidate for representative for the third representative district of the Territory. *Thompson v. Mott-Smith*, 334.

2. *Statement by candidate of party affiliation or non-partisanship.*

The failure of a candidate to state at the time of filing his nomination paper, by what political party he is nominated or his non-partisanship, will not require or justify the omission of the candidate's name from the official ballot. *Thompson v. Mott-Smith*, 334.

EMINENT DOMAIN.1. *Power to exercise—privy council.*

A resolution of the privy council of the Hawaiian Kingdom that certain land "be and is hereby confirmed as government property and that Governor Kekuanaoa's claim therefor is hereby negatived," adopted in response to an adverse claim by Kekuanaoa on behalf of another individual for the land mentioned, was not intended to be and was not an exercise of the power of eminent domain. *In re Title of Pa Pelekane*, 175.

EMPLOYER AND EMPLOYEE.

See MASTER AND SERVANT.

ENTERPRISE FOR PROFIT.

See TAXATION, 9.

EQUITABLE RELIEF.

See JUDGMENTS, 2; LANDLORD AND TENANT, 5, 6.

EQUITY.

1. *Amendment of decree by motion.*

A decree, if the right has not been lost by negligence, or by unreasonable delay, may be amended on motion as to mere clerical errors, or by the insertion or striking out of any matter which would have been inserted or omitted as a matter of course if it had been asked for at the hearing as necessary or proper to carry into effect the decision of the court. *In re Title of Palmyra Island*, 431.

2. *Answer as evidence.*

Where the answer to a bill in equity denies the facts charged in the bill only upon information and belief, more testimony than that of one credible witness is not required to establish the allegations of the bill. *Wond v. Mikalemi*, 288.

3. *Injunction bond—counsel fees—costs.*

Counsel fees, as well as costs and other charges or damages, paid or sustained to obtain a dissolution of a restraining order are damages directly and proximately resulting from the issuance of the injunction and are recoverable; and such damages may be assessed and awarded in equity, it being within the sound discretion of the circuit judge as to whether or not in each particular case he will himself dispose of the matter or leave the parties to an action at law. *Young Chun v. Robinson*, 193.

4. *Injunction bond, form and substance of.*

There is no specific statutory provision relating to injunction bonds. The form and substance of the bond to be filed must necessarily be such as the well established principles of equity require, the determination of which, as well as the application, are matters resting in the sound judicial discretion of the circuit judge. *Young Chun v. Robinson*, 193.

5. *Injunction—bond—counsel fees—costs.*

Damages consequent upon the dissolution of a temporary injunction are not recoverable in the absence of a bond to secure their payment, unless malice and want of probable cause in the procurement of the injunction are shown. In such a case counsel fees are not taxable as costs. *Young Chun v. Robinson*, 368.

6. *Purpose of suit—remedy in personam.*

A suit in equity, the essential purpose of which is to establish a trust with reference to, as well as to establish a title in certain land, is purely a proceeding in personam, and jurisdiction of

EQUITY—Continued

the persons of the defendants, non-residents, cannot be acquired by substituted service. *Sackwitz v. Goodwin*, 84.

7. *Suit to quiet title.*

A bill in equity cannot be maintained as a bill of peace to quiet title in the absence of an averment that the complainant has established his title through litigation at law. *Paiko v. Boeynaems*, 196.

8. *Suit to remove cloud on title.*

A bill in equity cannot be maintained as one to remove a cloud on title to land where the alleged cloud consists merely of verbal assertions of a pretended claim. *Paiko v. Boeynaems*, 196.

9. *Jurisdiction to construe wills.*

A court of equity has no jurisdiction to construe a will where no trust is involved and the claims of the parties are of strictly legal interests in land. *Paiko v. Boeynaems*, 196.

10. *Practice—cause remanded for further proceedings.*

The complainant, a judgment creditor of a corporation, having filed his bill to reach unpaid subscriptions to the capital stock of the corporation in satisfaction of his judgment, execution having been returned nulla bona, and the trial judge declining to admit the judgment in evidence, the complainant rests and the respondents also rest without putting on any evidence, whereupon a decree is entered dismissing the bill. The complainant appeals and the decree is reversed and the cause remanded with instructions to the trial judge "to receive the judgment in evidence and for such further proceedings as may be proper," which instruction, in effect, is a direction to the trial judge to resume the hearing at the point where the judgment was offered in evidence and, not only to receive the judgment in evidence, but to proceed according as law and justice might require, the case being reopened for the respondents as well as for the complainant. *Carey v. Hawaiian Lumber Mills Co., Ltd.*, 506.

See also JUDGMENTS, 2; PARTITION; PLEADING, 6; PROHIBITION, 2, 3; RECORDS, 2.

ESTOPPEL

1. *Bill of lading—warehouse receipt.*

The plaintiff being the owner of certain cement in Los Angeles shipped the same by rail to San Pedro, the bill of lading therefor being indorsed to the order of T, a special agent of plaintiff for the sale of the cement in Honolulu. On arrival of the cement in Honolulu it was stored in warehouses in the name of T, who, by the terms of the agency agreement was to assume all expenses of unloading, storing and marketing the cement. T bartered the cement for a ship. Held that the plaintiff, in an action

ESTOPPEL—Continued.

of trover, was not estopped to assert its title to the cement as against the defendants who received certain of the cement or proceeds of sales thereof crediting same against antecedent debts of the former owner of the ship. *Riverside Portland Cement Co. v. Von Hamm-Young Co.*, 727.

2. *Nature of representation essential to constitute an estoppel in pais.*

A representation in order to give rise to an estoppel need not necessarily have been made directly to the person claiming the estoppel with the intention that he in particular should act upon it. It is enough that it was made under such circumstances as would warrant the assumption that the party making the representation must have understood that one knowing of it might reasonably believe it to be true and act upon it. A representation may consist of acts and conduct as well as of words, but in any case, in the absence of a fraudulent intent, the act, conduct or words must have been so clear, definite and unambiguous as to cause one, as a reasonable person, to form a belief of an existing fact. *Carty v. Jarrett*, 274.

3. *When question of law.*

When the facts which are claimed to constitute an estoppel are undisputed the question whether an estoppel exists is one of law. *Carty v. Jarrett*, 274.

ESTRAYS.

See **ANIMALS**.

EVICITION.

See **LANDLORD AND TENANT**, 2.

EVIDENCE.

1. *Attested instruments—mode of proof.*

In this jurisdiction it is not necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite. Such an instrument may be proved by admissions or otherwise as if there were no attesting witness thereto. *Kaeo v. Ozaki*, 633.

2. *Burden of—adverse possession.*

The burden of proving adverse possession on the part of the defendant rests upon him, and it is immaterial in the application of this rule whether the plaintiff has acquired title by deed or by prior adverse possession. *Leialoha v. Wolters*, 624.

3. *Circumstantial—inferences.*

In a case of circumstantial evidence, there being evidence of certain facts, if believed by the jury, from which facts inferences of guilt can reasonably be drawn by the jury, the verdict cannot

EVIDENCE—Continued.

be disturbed. In reaching its conclusion the jury is at liberty to accept and act upon the evidence consistent with the theory of guilt and to reject the evidence inconsistent therewith, provided the verdict returned is supported by evidence as to all the essential and material elements of the crime charged. *Territory v. Chung Nung*, 214.

4. *Admissibility of testimony.*

At the time the defendant was arrested the officers, for the purpose of making an examination of his person, directed him, but without the use of any force, or threats, or the holding out of any inducement, to remove a portion of his clothing, which he did without objection. The purpose of the examination thus made was to obtain proof of a physical fact, and not to compel the defendant to be a witness against himself. At the trial of the defendant, testimony by one of the officers as to the result of the examination was admissible. *Territory v. Chung Nung*, 214.

5. *Admissibility of evidence.*

A statement in the nature of a confession made by a person while in jail and before any charge is entered against him, made in the presence of the Deputy City and county attorney and police officers, and without the advice of counsel, but made freely and voluntarily, is admissible in evidence. *Territory v. Chung Nung*, 214.

6. *Corroborative circumstances.*

Upon a charge of practicing medicine without a license by performing a specific act of treatment of disease, evidence that the accused the day before the commission of the alleged act asserted that he had cured disease and could effect cures by the use of the drug which he is alleged to have used in the particular case, is admissible as corroborative evidence which tends to explain and characterize the act, and to negative a possible claim that it was one of mere friendly and non-professional assistance. *Territory v. Takamine*, 465.

7. *Inconsistency with pleading.*

In assumpsit an answer admitting that the amount sued for is due to seven persons named renders untenable at the trial a claim that the debt is due to the seven persons and certain others as partners. *Kao v. Ozaki*, 633.

8. *Judicial notice.*

The former governments of the Hawaiian Islands are not to be regarded as foreign governments. The courts of this Territory take judicial notice of the laws of Hawaii which were enacted prior to the annexation of the Islands by the United States, as well as of the principal facts of Hawaiian history, and the public

EVIDENCE—Continued.

records of the Hawaiian government when called to the attention of the court. *In re Title of Pa Pelekane*, 175.

9. *Judicial notice—Hawaiian language.*

In this jurisdiction the Hawaiian language is not to be regarded as a foreign language, but as one of which the courts and judges must take judicial notice, and in rendering into English a will written in the Hawaiian language the courts and judges are at liberty to use their own knowledge of the Hawaiian language and may resort for assistance to such trustworthy sources of information as they may deem advisable, or to which their attention may be directed. *Hapai v. Brown*, 499.

10. *Judicial notice.*

A court takes judicial notice of the territorial extent of its own jurisdiction and of the general geographical features and subdivisions of the district over which its jurisdiction extends. The district court of Makawao, county of Maui, takes judicial notice of the fact that Omaopio is in the district of Makawao. *Correa v. Kapioho*, 532.

11. *Burden of proof*

Under section 21 of Act 125, Laws of 1907, relating to the procedure in a suit instituted to determine the validity of impounding animals, the burden is upon the party who impounds the animals to show that he has the right to impound them. *Correa v. Kapioho*, 532.

12. *Mere scintilla.*

A mere scintilla of evidence is insufficient to support a finding of fact.

Certain findings in this case held to be unsupported by evidence. *Tyler v. Wise*, 148.

13. *Mere scintilla insufficient.*

A mere scintilla of evidence is insufficient to support a finding of fact. *Scott v. Hawaiian Tobacco Plantation*, 493.

14. *Parol evidence to explain contract.*

Parol evidence is inadmissible to explain or vary the plain meaning of the language of a written agreement. *Davis v. Mills*, 167.

15. *Pedigree—sufficiency to sustain verdict.*

Upon an issue as to whether P and I, now dead, were half brothers, the plaintiff's proof consisted solely of the hearsay testimony of witnesses who claimed to have been told by P, I and K, the latter a brother of I, that P and I were half brothers. The testimony of these witnesses was such as to permit reasonable men to doubt its truth. For the defendants some witnesses who were members of the family of I and K and others who though not thus related were so situated as naturally to have

EVIDENCE—Continued.

heard of the alleged relationship if it existed, testified that at no time prior to the litigation had they heard that P was the half brother of I. Held, that a verdict that P was not the half brother of I was sustained by evidence. *Uuku v. Kaio*, 710.

16. *Presumptions as to continuity.*

It is a rule of evidence that where the existence of a fact, condition or state of things is once established, the law presumes that such fact, condition or state of things, continues to exist as before, until the contrary is shown, or a different presumption is raised. Thus, the original corporators and stockholders of a corporation are presumed to continue the same as when the corporation was organized, and such presumption will so continue until the contrary is shown, or a different presumption is raised. *Carey v. Hawaiian Lumber Mills Co., Ltd.*, 506.

17. *Request to make payment—sufficiency of proof.*

P covenanted that in the event that W should be "held liable by judgment of a court of competent jurisdiction on account of any claim or demand arising out of a certain redelivery bond," describing it, he would "save and hold harmless" the said W "therefrom to the extent of" a sum named. Judgment was rendered against W by a court of competent jurisdiction upon the bond. In an action by A against P upon the covenant, held that a motion for non-suit was incorrectly granted, the evidence being sufficient to support a finding that the judgment was paid by A to the judgment creditor at the request of W and that in consideration of the payment A received from W an assignment of the latter's claim against P. *Henry Waterhouse Trust Co. v. Paris*, 46.

18. *Res gestae—spontaneous declaration.*

A declaration to be part of the *res gestae* in a personal injury case need not be strictly contemporaneous with the transaction or event to which it relates; it is enough that it was a spontaneous utterance engendered by the excitement of the main event made immediately after and under the influence of the occurrence and so connected with it as to characterize or explain it. *Navelo v. Von Hamm-Young Co.*, 644.

19. *Translation of will in foreign language—meaning of words.*

In an action of ejectment in which one of the parties claims as devisee under a will written in a foreign language it is competent for witnesses to testify not only to the possible meanings of particular words when used separately but also to the sense in which, in the witnesses' opinion, those words are used when read in connection with the remainder of the text. *Lau Lam v. Whitcomb*, 253.

EVIDENCE—Continued.

See also ASSUMPSIT, 4; BOND, 3; CONTRACTS, 5; DIVORCE, 6; EJECTMENT; EQUITY, 2; JUDGMENTS, 1; LIMITATION OF ACTIONS, 3; TENANCY IN COMMON, 1, 2.

EXCEPTIONS, BILL OF.

1. *Sufficiency.*

The mere statement in a bill of exceptions that the defendants "except to the decision" of the court, is not sufficient to bring to this court any question or error for review. One of the essential purposes of an exception is, that the attention of the trial court is thereby specifically called to a particular point of law going to the legal sufficiency of the ruling made, thus affording the court an opportunity to correct the supposed error. *Scott v. Kona Development Co.*, 258.

See also COSTS, 11.

EXCESS OF JURISDICTION.

See JUDGES, 1.

EXECUTIONS.

1. *Officer's return.*

A sheriff's return to an execution is not conclusive against a stranger to the proceeding in which the writ was issued whose rights are affected by it. *Ferry v. Hakalau Plantation Co.*, 745.

2. *Levy on growing crop.*

Where an officer purporting to levy an execution on a growing crop of sugar cane merely read the writ to the execution defendant and posted the usual notices of sale in public places, but did not go to the premises where the cane was growing, did not see the property sought to be levied on, never obtained possession of it, and made no indorsement of the attempted levy on the writ until the return was made after the sale of the property, held, that no valid levy was made. *Ferry v. Hakalau Plantation Co.*, 745.

3. *Title of purchaser where levy invalid.*

In order that a sheriff's sale of personal property taken upon execution shall vest in the purchaser a good title it is indispensable that a valid levy shall have been made. *Ferry v. Hakalau Plantation Co.*, 745.

See also PROHIBITION, 3.

EXECUTION SALES.

See FRAUDULENT CONVEYANCES, 3.

EXECUTORS AND ADMINISTRATORS.

1. "*Administrators with the will annexed*"—inference that property devised.

EXECUTORS AND ADMINISTRATORS—Continued.

From the fact that certain administrators were appointed "with the will annexed" the inference would seem to be that the probate court proceeded upon the assumption that the document referred to in the petition as a will did contain a devise of property, otherwise the case would have been one of intestacy and the appointment would have been of administrators without any reference to a will. *Lau Lum v. Whitcomb*, 253.

EXEMPTION.

See TAXATION, 3.

EXPERT WITNESSES.

See COSTS, 4.

EXTRADITION.

1. *Purpose of—prisoner on parole.*

Where a prisoner in California, who has been released on parole on certain conditions including the conditions that he would not leave the county in which he had been convicted without the permission of the probation officer of that county, and that he would report to such officer twice each month as to his conduct and deportment, leaves that State and comes to this Territory in violation of the terms of his parole, and his extradition and return to California for the purpose of serving his sentence is sought, the offense for the commission of which he was convicted, and not the breaking of parole, must be regarded as the ground upon which the requisition for his apprehension and delivery is based. *In re Gertz*, 526.

2. *Escaped prisoner—violation of parole—fugitive from justice.*

A prisoner is charged with crime as well after he has been convicted and sentenced, the sentence remaining unsatisfied, as before trial, and he may be extradited as a fugitive from justice in this Territory where it is shown that he left the State wherein he was convicted in violation of the conditions upon which he had been released from jail upon parole, one of those conditions being that he should not leave the county in which he had been convicted and sentenced. An escape from the limits prescribed in a parole is, in effect, an escape from the jail. *In re Gertz*, 526.

EXTREME CRUELTY.

See DIVORCE, 3, 4, 9.

FAILURE OF PROOF.

See ASSUMPSIT, 2; RECORDS, 3.

FAILURE TO SUPPORT.

See DIVORCE, 5.

FALSE IMPRISONMENT.**1. Liability of persons complaining—invalid order for detention of witness.**

Persons directly interested in the prosecution of an offender who, either personally or indirectly through their attorneys, request of the attorney-general and the court having general jurisdiction of the subject-matter that an order be issued designed to secure the attendance of a certain witness are not liable in an action for damages resulting in consequence of the order, even though the order prove to have been in excess of the jurisdiction of the court. *Gomez v. Whitney*, 539.

FEES.

See COSTS, 2.

FELLOW SERVANT.

See MASTER AND SERVANT.

FINAL ORDER.

See APPEAL AND ERROR, 4.

FINDINGS OF FACT.

See EVIDENCE, 12, 13; TRIAL, 2.

FISH.**1. Close season for amaama.**

The preservation of fish is within the proper domain of the police power. The legislature may provide by statute for a close season for the protection of amaama notwithstanding the declaration contained in section 95 of the Organic Act. *Territory v. Hoy Chong*, 39.

2. Sale of fish taken from a private pond.

The prohibition against selling amaama during the close season contained in Act 110, Laws of 1911, will apply to fish taken from a private pond unless it is made to appear that there is no passageway connecting such pond with the sea, or other waters, through which amaama may pass. The sale of amaama taken from privately owned ponds during the close season may be prohibited if such prohibition is found to be necessary in the endeavor to protect the amaama of the sea waters of the Territory. *Territory v. Hoy Chong*, 39.

FISHERIES.

See CONSTITUTIONAL LAW, 7.

FORECLOSURE.

See MORTGAGES.

FOREIGN NAMES.

See NAMES.

FORFEITURE.

See LANDLORD AND TENANT, 5, 6.

FRAUD.

See ASSUMPSIT, 5, 6; CONTRACTS, 4; DEEDS, 1, 2; PLEADING, 2.

FRAUDS, STATUTE OF.

See EASEMENTS.

FRAUDULENT CONVEYANCES.

1. *Statute 13th Elizabeth—common law.*

The statute of 13th Elizabeth relating to conveyances made in fraud of creditors was in affirmance of the principles of the common law and is a part of the common law of this Territory. *Dee v. Foster*, 1.

2. *Conveyances void at law as well as in equity.*

A deed void because made with intent to defraud a creditor is, as to the defrauded creditor, void at law as well as in equity. *Dee v. Foster*, 1.

3. *Right of purchaser at execution sale.*

The purchaser at an execution sale of a debtor's interest in land acquires the legal title and may, in an action of ejectment against one in possession claiming under a deed from the debtor, attack the validity of the deed on the ground that it was made with intent to defeat the judgment and defraud the judgment creditor. *Dee v. Foster*, 1.

FRAUDULENT REPRESENTATIONS.

See CONTRACTS, 4.

FREEHOLD AGREEMENTS.

See Public Lands, 3, 4, 5.

FUGITIVE FROM JUSTICE.

See EXTRADITION, 1, 2.

FULL CASH VALUE.

See TAXATION, 5.

GARNISHEE.

See PARTIES, 1.

GARNISHMENT.

1. *Seamen's wages.*

Under the federal statutes the wages of a seaman engaged in the merchant trade between ports in this Territory, the seaman

GARNISHMENT—Continued.

not having been shipped by a shipping commissioner, may be attached by a creditor in garnishment proceedings. *Schnack v. Clark*, 661.

GROWING CROPS.

See EXECUTIONS, 2.

GUARDIAN AD LITEM.

See INFANTS, 1, 2.

HABITUAL INTEMPERANCE.

See DIVORCE, 6.

HAWAIIAN LANGUAGE.

See EVIDENCE, 9.

HEALTH.

1. *Boards of—power to make regulations.*

Boards of health have no implied or inherent power to make regulations having the force of law. *Territory v. Araujo*, 55.

2. *Boards of—statutory power, grant of.*

Powers conferred upon boards of health to enable them to effectually perform their functions in safeguarding the public health should receive a liberal construction, but a regulation is void which goes beyond the limits of the power conferred by the legislature. *Territory v. Araujo*, 56.

3. *Boards of—regulation of board of health against having, keeping or maintaining banana trees.*

Section 6 of a regulation made by the territorial board of health on November 9, 1911, making it unlawful to have, keep or permit, within certain areas, any banana tree or any other tree or plant capable of holding water in which mosquito larvae are liable to breed, held to be not authorized by Section 991 of the Revised Laws, as amended by Act 132 of the Session Laws of 1911, providing that the board of health may make such regulations respecting water in which mosquito larvae breed as it shall deem necessary for the public health and safety. *Territory v. Araujo*, 56.

HEARINGS.

See CONSTITUTIONAL LAW, 3.

HIGHWAYS.

See NEGLIGENCE.

HOME.

See PUBLIC LANDS, 6.

HUIS.

See LANDLORD AND TENANT, 3; TAXATION, 1.

HUSBAND AND WIFE.

See DIVORCE.

ILLEGALITY.

See CONTRACTS, 1.

IMMATERIAL AVERMENTS.

See INDICTMENT AND INFORMATION, 2.

IMMUNITY.

See JUDGES, 2.

IMPLIED AUTHORITY.

See PRINCIPAL AND AGENT, 4.

IMPLIED PROMISE.

See ACCOUNT STATED; CONTRACTS, 6.

IMPOUNDING.

See ANIMALS.

IMPROVEMENTS.

See LANDLORD AND TENANT, 9.

INCOME.

See TAXES, 3.

INCONSISTENT DEFENSES.

See PLEADING, 5.

INDICTMENT AND INFORMATION.

1. *Common nuisance, sufficiency of information for.*

An information, which charges that defendant did, during a certain period, continually, wilfully and unlawfully turn loose, and continually, wilfully, unlawfully and knowingly permit, "certain dairy cattle" to go abroad, roam about, lie about, graze and assemble together in and upon a certain public highway, thereby obstructing, hindering and disturbing the lawful use thereof, and endangering the safety of the public, is fatally defective, in that it does not show that defendant was the owner of or had control over the cattle referred to. *Territory v. Henriques*, 50.

2. *Immaterial averment—surplusage need not be proved.*

An averment in an indictment or charge which does not relate to any necessary element of the offense charged, and without which an offense is fully set forth, will be regarded as surplusage. Such an averment need not be proved, and the charge will not be vitiated by its presence. *Territory v. Takamine*, 465.

INFANTS.

1. *Appointment of guardian ad litem—formal order not necessary.*

The appointment of a guardian ad litem of minor defendants need not be made by a formal order. Any action on the part of the court whereby a person assuming to act as a guardian ad litem is recognized as such is equivalent to an appointment. *Lukua v. Manaia*, 160.

2. *Authority of guardian ad litem to consent to decree.*

A guardian ad litem of minor defendants in a partition suit may stipulate for the entry of a consent decree. In the absence of any showing of fraud or bad faith or that the interests of the minors have been prejudiced, such decree will not be disturbed on motion of the purchaser at the partition sale. *Lukua v. Manaia*, 160.

INFERENCES.

See EVIDENCE, 3.

INFORMATION.

See INDICTMENT AND INFORMATION, 1.

INJUNCTION.

1. *Principles governing issuance—prima facie case.*

To authorize a temporary injunction, a prima facie showing in the bill of a right to the final relief is essential. *Young Chun v. Robinson*, 70.

See also EQUITY, 5.

INJUNCTION BOND.

See EQUITY, 3, 4.

INSTRUCTIONS.

See TRIAL, 3, 4, 5.

INSURANCE.

See MUTUAL BENEFIT INSURANCE.

INTOXICATING LIQUORS.

1. *Delivery by agent of vendees.*

M. R. was employed by R. & Co., wholesale liquor dealers in Honolulu, to solicit orders for liquor in the county of Kauai. The liquor was delivered by R. & Co. to a common carrier in Honolulu for shipment to the purchasers pursuant to their orders. M. R., while so employed by R. & Co., at the request and expense of the purchasers, received the liquor at the wharf on Kauai and attended to the delivery of it to the purchasers at their homes and places of business. He did not in thus receiving and attending to the delivery of the liquor violate any of

INTOXICATING LIQUORS—Continued.

the provisions of Act 119, Laws of 1907, as amended by Act 70, Laws of 1913. *Territory v. Reis*, 772.

INVALID LEVY.

See EXECUTIONS, 3.

INVALID ORDERS.

See FALSE IMPRISONMENT.

JUDGES.

1. *Civil liability for judicial acts—excess of jurisdiction.*

Judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, provided there is not a clear absence of all jurisdiction over the subject-matter. When jurisdiction over the subject-matter is invested by law in the judge or in the court which he holds, the extent and manner in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his decision in these particulars the validity of his judgment may depend, and for errors in his determination he is not civilly liable. *Gomez v. Whitney*, 539.

2. *Circuit judge—order to secure attendance of witness.*

The circuit court of the first judicial circuit of this Territory and its judges at chambers are courts of superior and general jurisdiction. A judge of that court, sitting at chambers, who in excess of his jurisdiction issues an order requiring a person to enter into a recognizance to appear and testify before a grand jury then engaged in investigating the commission of an offense within the general jurisdiction of the court and commanding that in default thereof the proposed witness be committed to jail, is entitled to the protection of the rule rendering judges immune from civil liability for damages. *Gomez v. Whitney*, 539.

See also OFFICERS, 2, 3, 4.

JUDGMENTS.

1. *Collateral attack—evidence dehors the record.*

The recital in a formal judgment regular and valid on its face that it was entered by the court cannot be contradicted in a collateral proceeding by evidence dehors the record. *Carey v. Hawaiian Lumber Mills, Ltd.*, 311.

2. *Equitable relief against—defense available at law.*

A court of equity will not restrain the enforcement of a judgment at law upon a ground which was available to the complainant as a defense in the action and which was not presented as a defense merely through the choice or fault of the defend-

JUDGMENTS—Continued.

ant at law unmixed with any fraud, fault or negligence of the plaintiff. *Scott v. Pilipo*, 766.

3. *Res judicata*—burden of proof.

The burden of proving a former adjudication is upon the party who sets it up as a defense. *Lau Lam v. Whitcomb*, 253.

See also APPEAL AND ERROR, 1; ARBITRATION AND AWARD, 3; SET-OFF AND COUNTER-CLAIM; SUBMISSION OF CONTROVERSY.

JUDGMENT CREDITORS.

See FRAUDULENT CONVEYANCES, 3.

JUDICIAL SALES.

1. *Application of purchase money.*

The purchaser at a partition sale upon paying the purchase money into court is not bound to see to the application of the money, and, hence, may not complain of a provision in the decree of sale that a portion of the proceeds of sale shall be distributed to the guardian ad litem of certain minor defendants who has not been required to give security. *Lukua v. Manala*, 160.

JUDICIAL NOTICE.

See EVIDENCE, 8, 9, 10.

JURISDICTION.

See APPEAL AND ERROR; ARBITRATION AND AWARD, 1; ATTORNEY-GENERAL; COURTS; DIVORCE, 2; EQUITY, 9; EVIDENCE, 10; JUDGES, 1; PROHIBITION, 2.

JURY.

1. *Jurors excused prior to service of summons.*

The excusing of jurors prior to service of summons and of the court's own motion, if not contemplated by the statute, is, at most, a mere irregularity of which a defendant under indictment has no reason to complain, if the grand jury finding the indictment and as finally constituted is composed wholly of qualified jurors, and if the defendant is not injured by the proceedings. *Territory v. Chung Nung*, 66.

See also TRIAL, 4.

JURY TRIAL.

See CONSTITUTIONAL LAW, 5, 7.

JURY WAIVED CASES.

See NEW TRIAL, 1.

LAND COMMISSION AWARDS.

See PUBLIC LANDS, 2.

LANDLORD AND TENANT.

1. *Agreement to assign lease—covenant to repair.*

M, a lessee under a lease containing a covenant to repair, enters into a written agreement with N to assign the lease for \$250, payable in installments, and upon full payment being made, the assignment to be executed. N enters into possession of the premises by virtue of the agreement to assign, under the terms of which he is bound to observe the covenant to repair. For failure to repair, the landlord in an action for summary possession against M, recovers possession of the premises, whereupon N brings an action against M to recover the sum of \$150, being part of the purchase price, paid by him to M, pursuant to the agreement to assign. Held, the action cannot be maintained, the forfeiture and cancellation of the lease, with the consequent loss of possession to N, being, as the court assumes, the direct result of his own failure to observe the covenant to repair. *Anani v. Mirikidani*, 489.

2. *Eviction.*

To constitute an eviction it is not necessary that there should be an actual physical expulsion of the tenant from the premises. Any act of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises may be treated as an eviction. But, strictly speaking, there can be no eviction from premises of which the tenant never acquired the possession. *Pillpo v. Scott*, 609.

3. *Lease of undivided interest in land.*

A lease of an undivided portion of the interest of a member of a Hawaiian land hui in a tract of land owned by the hui constitutes the lessee a tenant in common with the members of the hui of the whole tract. But the lessee is not relieved from the payment of rent on the ground of eviction by the lessor because of the lessee's inability to obtain possession of certain specific portions of the common land which prior to and at the time of the execution of the lease were in the exclusive occupation of the lessor or other members of the hui pursuant to a custom of the hui. *Pillpo v. Scott*, 609.

4. *Failure of lessor to deliver possession—remedy at law.*

The lessor's failure to deliver possession to the lessee, in so far as it is a violation of the lessor's duty under the lease, absolves the lessee from his obligation to pay rent and is available as a defense at law in an action for the recovery of the rent. *Scott v. Pillpo*, 766.

5. *Relief in equity against forfeiture of lease.*

Equity will relieve against the forfeiture of a lease for the lessee's failure to pay taxes where such failure was not due to

LANDLORD AND TENANT—Continued.

gross negligence and was not persistent and wilful. Where the lessee has been lulled into non-action by equivocal conduct on the part of the lessor the failure to pay the taxes may be regarded as not wilful and persistent. *Kanakanui v. De Fries*, 123.

6. *Relief in equity against forfeiture of lease.*

Equity will not relieve a lessee from a forfeiture for breach of condition where the breach has been wilful and persistent and was not induced by any act of the lessor. *Kanakanui v. De Fries*, 381.

7. *Summary proceedings—affidavit to oust jurisdiction of district court.*

An affidavit in the district court, in support of a plea that title to real estate is involved, is insufficient under supreme court rule 15 when no facts are alleged showing title in the defendant or in some third party under whom he claims. *Coerper v. Gouveia*, 270.

8. *Necessary proof of plaintiff—defense by defendant.*

In an action for summary possession it is incumbent on plaintiff to show that the relation of landlord and tenant exists between himself and defendant and that he is entitled to immediate possession. Defendant may show in defense any fact which tends to disprove plaintiff's alleged right to recover. He may show that the relation of landlord and tenant has ceased to exist, and that the landlord's title has terminated. Even though the evidence offered in defense may bring the title in question, it does not necessarily follow that such evidence is, for that reason alone, inadmissible. However, under the provisions of Section 1662 R. L. the jurisdiction of the district court ceases the instant it is discovered that the title to real estate has come into question. *Coerper v. Gouveia*, 270.

9. *Taxes on improvements.*

Where a lease requires that the lessee pay the taxes on the improvements made or erected on the land, the lessee is not liable for taxes on increased value due to the filling in of the land. *Pang Chew v. Kealakai*, 386.

LANDS.

See PUBLIC LANDS.

LEASE.

See LANDLORD AND TENANT, 1, 2, 3, 4, 5, 6, 9.

LEVY.

See EXECUTIONS, 2, 3.

LEX REI SITAE.

See WILLS, 4.

LICENSES.

1. *Parol license revocable.*

A parol license for a right of way over the land of the licensor, where no expenditures of money have been made or improvements constructed in reliance upon its assumed permanency and the status quo may be restored without loss to the licensee, may be revoked at the will of the licensor. *Ideta v. Kuba*, 751.

LIENS.

See MECHANIC'S LIENS.

LIFE INSURANCE COMPANIES.

See TAXATION, 6.

LIMITATION OF ACTIONS.

1. *Acknowledgment and new promise.*

An assertion by the debtor that "it" (the indebtedness sued on) "will be fully and satisfactorily met later on" is sufficient as an acknowledgment and new promise to take the case out of the operation of the statute of limitations. *Davis v. Mills*, 167.

2. *Action for taxes.*

The statute of limitations does not run against the Territory upon a claim for taxes. *Keola v. Parker*, 597.

3. *Conflicting evidence—nonsuit.*

It is error to grant a motion for a nonsuit at the close of the plaintiffs' case, in an action of ejectment, even if there is some evidence tending to show that the defendant took possession of the land more than ten years before the plaintiffs began the action, there being also evidence tending to show the contrary. The court should not grant a motion for a nonsuit on conflicting evidence. *Leialoha v. Wolters*, 304.

See also ADVERSE POSSESSION.

MAGISTRATE'S RECORD.

See CRIMINAL LAW, 3.

MAHELE.

See PUBLIC LANDS, 1.

MAINTENANCE OF HOME.

See PUBLIC LANDS, 6.

MANAGERS.

See CORPORATIONS, 2.

MASTER AND SERVANT.

1. *Fellow servants—negligence.*

The general rule of law is that one who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow servants in the course of the employment.

MASTER AND SERVANT—Continued.

An employer is not liable for an injury to one employee occasioned by the negligence of another engaged in the same general undertaking; it is not necessary that the servants should be engaged in the same operation or particular work; it is enough to bring the case within the general rule of exemption, if they are in the employment of the same master, engaged in the same common enterprise, both employed to perform duties tending to accomplish the same general purposes, or, in other words, if the services of each in his particular sphere or department are directed to the accomplishment of the same general end; and accordingly in the present case, upon the facts stated, the injured carpenter and those operating the train are to be considered fellow servants within the rule.

A servant is deemed in law to have contemplated the possibility of accidents due to the negligence of his fellow servants with whom he comes in contact in the course of the performance of his duties. *Silva v. Ewa Plantation Co.*, 129.

MECHANICS' LIENS.

1. *Completion of building.*

The statutory period for the filing of liens of mechanics and materialmen commences to run only from the final completion of the structure. When labor and material required by the terms of a contract for the erection of a building are not furnished in the first instance and are subsequently supplied by the contractor at the request of the owner, the latter refusing to accept the building as at first tendered, the final completion of the structure within the meaning of section 2174 R. L., as amended by Act 97 of the laws of 1909, dates from the time the omissions are so supplied, even though in the meantime the owner takes possession of the property. *Lucas v. Hustace*, 121.

2. *Completion of building—abandonment.*

A building is to be deemed complete, within the meaning of the statute relating to the liens of mechanics and materialmen, upon abandonment by the contractor when the building is substantially but not entirely completed and the owner takes no steps to complete it. *Lansing v. Dondero*, 736.

3. *Notice of claim—description of property—requisites.*

Under R. L. Sec. 2174, the description of the property against which a lien is sought must be such as to enable not only the owner but also prospective purchasers and creditors to identify the property. *City Mill Co. v. Horita*, 585.

4. *Misdescription of property—lien on part of structure.*

In a notice of a material-man's lien the property was described as the building erected under a certain contract with the owner

MECHANICS' LIENS—Continued.

and "Lot 8, Block 103, Palolo Tract." The facts were that the building stood mainly on lot 10 and to a slight extent only on lot 8. Held, that, while courts are liberal in the construction of descriptions in notices of liens, the description in this case was precise and unambiguous and did not include lot 10 and that no lien attached to lot 10 because not included in the description or to lot 8 because the building stood substantially on lot 10 or to the building separately or any part thereof because not within the contemplation of the statute. *City Mill Co. v. Horita*, 585.

MEDICINE.

See PHYSICIANS AND SURGEONS.

MERGER.

See REMAINDERS.

MILEAGE.

See COSTS, 3.

MODE OF PROOF.

EVIDENCE, 1.

MONEY HAD AND RECEIVED.

See ASSUMPSIT, 5.

MORTGAGES.

1. *Foreclosure for default in payment of interest—insufficiency of tender.*

In a suit for the foreclosure, for default in the payment of interest, of a mortgage providing that upon default in payment of the principal or the interest the mortgagee may foreclose and apply the proceeds of the sale as far as necessary to the payment of the principal, the interest and the costs, including a reasonable attorney's fee, tender of the amount of the interest and the costs of court is, in the absence of other defenses, and without a tender of a reasonable attorney's fee for services to date of tender, insufficient to ward off foreclosure. *Bowen v. Nakwina*, 471.

MOTIONS.

1. *Bill of particulars.*

A motion "that the prosecution be required to furnish defendant with a bill of particulars," without pointing out the particulars desired, is not sufficient. *Territory v. Ah Cheong*, 10. See also EQUITY, 1; NEW TRIAL, 1, 2; TRIAL, 8.

MOTION TO STRIKE.

See APPEAL AND ERROR, 2.

MUNICIPAL CORPORATIONS.

1. *Powers of board—rules of procedure.*

A municipal board can neither enlarge nor restrict its charter powers. A so-called rule of procedure which purports to restrict the powers of the municipality is without force as against the validity of an ordinance passed in pursuance of statutory authority. *Territory v. Dondero*, 19.

2. *Rules not invoked—how waived.*

A municipal board may waive its rules of procedure, either by formal action, or by failure to invoke them, or by ignoring them, if no objection is interposed. *Territory v. Dondero*, 19.

3. *Ordinance, title of*

The title of an ordinance is sufficient if it fairly indicates to the ordinary mind the general subject of the ordinance, is comprehensive enough to reasonably cover all its provisions, and is not calculated to mislead. *Territory v. Dondero*, 19.

4. *Ordinance in conflict with statute.*

The legislature has power to provide that no ordinance shall be held invalid on the ground that it covers any subject or matter embraced within any statute or statutes of the Territory, whether such ordinance is in conflict with any such statute or statutes or otherwise. *Territory v. Dondero*, 19.

5. *Validity of health ordinance.*

Section 1 of Ordinance No. 30 of the city and county of Honolulu, making it unlawful to expose for sale or to sell from any stock in trade within the municipality any game meat, poultry meat, butcher's meat, fish or sea food unless the same shall be protected from dust, dirt, and from contact of and contamination by flies and other insects and from promiscuous handling, and section 4 of said ordinance making it the duty of certain officers to enforce the provisions of the ordinance, and authorizing them to have access to any market, stall, store, stand or other place mentioned in the ordinance for the purpose of inspection, held to be within the power of the city and county of Honolulu to enact; held also that the provisions of those sections do not take property without due process of law; are not unreasonable, uncertain or indefinite or impossible of enforcement; and do not involve a void delegation of legislative power. *Territory v. Hop Kee*, 206.

6. *Sufficiency of charge for violation of ordinance.*

A charge of violating section 1 of said ordinance, in that the defendant "unlawfully and wilfully did expose for sale and sell certain foodstuffs, to wit, meat," is not demurrable on the ground that it does not designate the kind of meat which the defendant is accused of having exposed for sale and sold. *Territory v. Hop Kee*, 206.

MUTUAL BENEFIT INSURANCE.

1. *Designation of beneficiary—form of declaration.*

Where the by-laws of a benefit society prescribe a form of declaration to be used by members in disposing of mortuary benefits and provide that members "whenever practicable" shall use the blank forms supplied by the society, and the testimony shows that at the time of making a declaration the member was ill in a hospital at a place distant from Honolulu where the office of the society was located, and that neither the member nor the local agent of the society possessed one of the society's blank forms, the use of a declaration not of such form is permissible. *Gomes v. Lusitana Society*, 683.

2. *Waiver of requirements of by-laws.*

A by-law of a benefit society prescribing the form of declaration to be used by members in designating beneficiaries which is of a directory nature and designed for the protection or convenience of the society may be waived by it, and the acceptance by the society of a declaration irregular in form without notice or objection being given to the declarant will constitute a waiver of the irregularity, at least in a case where it is shown that the use of one of the society's forms was not practicable. *Gomes v. Lusitana Society*, 683.

3. *Effect of unauthorized disposition of portion of fund.*

A valid gift contained in a declaration will not be invalidated by reason of the presence of a provision attempting to make an unauthorized disposition of a portion of the fund.—*Gomes v. Lusitana Society*, 683.

4. *Designation of beneficiary—power of appointment.*

The mortuary benefit which becomes payable on the death of a member of a benefit society forms no part of his estate. The right of the member to designate a beneficiary under the contract of membership is a power of appointment which, generally speaking, may be exercised only in accordance with the terms of the contract. *Moniz v. Santo Antonio Society*, 591.

5. *By-laws—designation by will—waiver.*

Where the by-laws of a benefit society prescribe a form to be used by members in designating beneficiaries of death benefits, and provide that "the society does not accept or recognize the validity of any provision or provisions made in any documents disposing of the benefit or part of the same except the declaration which has been duly made out in conformity with the by-laws," the designation of a beneficiary in a will filed with the society does not constitute a valid designation, and the mere receiving and filing of the will by the society will not operate as a waiver of the by-laws so as to estop the society from setting up the invalidity of the designation in an action brought against

MUTUAL BENEFIT INSURANCE—Continued.

it to recover the amount of the benefit. *Monisi v. Santo Antonio Society*, 591.

NAMES.

1. *Variance—Anglicizing foreign names.*

In pleading extreme strictness is not required in writing in English a Japanese name. *Kaeo v. Ozaki*, 633.

NEGLECT.

1. *Defective condition of tree near highway—duty of owner.*

The owner of land on which he permits a tree to remain near the public highway is under a legal obligation to take reasonable care that it shall not fall into the highway and injure persons lawfully there. Though the defective condition of the tree was the result of natural causes, still, if such defect was known, or by the exercise of ordinary care could have been known, by the owner, it was the duty of the owner to exercise reasonable care and diligence to prevent the tree from falling and thereby injuring those who might have occasion to use the public highway. *Medeiros v. Honoma Sugar Co.*, 155.

See MASTER AND SERVANT.

NEWLY DISCOVERED EVIDENCE.

See NEW TRIAL, 3.

NEW TRIAL.

1. *Jury-waived cases—decision against weight of evidence.*

Upon a motion for a new trial in a jury-waived case the trial judge may set aside his own decision if convinced that it is contrary to the weight of the evidence. *Wall v. Focke*, 551.

2. *Grounds of motion—necessity of determination.*

The granting of a motion for a new trial upon one only of the grounds named in the motion does not of itself import an over-ruling of the other grounds. In such a case every ground should be passed upon. *Wall v. Focke*, 551.

3. *Newly discovered evidence—due diligence.*

A new trial will not be granted on the ground of newly discovered evidence where the movant might by the exercise of due diligence have discovered the proposed evidence before the trial. Search for the evidence wherever there is a probability of finding it is essential to due diligence. The rule is especially applicable where there have been several trials.

In order to justify the granting of a new trial on the ground just stated it must appear that all of the attorneys who presented the movant's case at the past trials used such due diligence and that none of them were aware of the existence of the proposed evidence. *Uuku v. Kato*, 710.

See also APPEAL AND ERROR, 3.

NOMINATIONS.

See ELECTIONS.

NON-JOINDER.

See PARTIES, 2.

NON-SUIT.

See LIMITATION OF ACTIONS, 3.

NOTICE.

See CONSTITUTIONAL LAW, 3.

NUNC PRO TUNC.

See ARBITRATION AND AWARD, 2.

NUISANCES.

See INDICTMENT AND INFORMATION, 1.

OFFICERS.

1. *Call for proposals to perform public work—requirements as to proposals.*

The superintendent of public works having called for sealed tenders or proposals to perform certain work, and having required bidders to submit both a unit and a total bid on each item of work to be done, or material to be furnished, a bidder filed a proposal to perform the work and furnish the material, in which proposal there were, among others, two items, which, in effect read: 455 lineal feet of concrete pipe at ten cents per foot, total \$455; 122 lineal feet of masonry wall at seventy-five cents per foot, total, \$915; which proposal the superintendent of public works rejected. Held, that the proposal did not comply with the requirements, in that the unit and total bids did not correspond, and it being uncertain which the bidder intended as the correct bid—the unit bid or the total bid—the proposal was properly rejected. *Foster v. Honolulu Construction & Draying Co., Ltd.*, 689.

2. *De facto judge—collateral attack upon authority.*

Where a justice of the supreme court of this Territory, after the expiration of the term for which he was appointed, in good faith continues to act as a member of the court and to perform the duties of the office, and does so with the acquiescence of the department of justice, the other members of the court, the bar, and litigants, and no new appointment has been made and no other person claims the office, he is at least a de facto judge and his authority is not open to attack in a collateral proceeding. *Wilder v. Colburn*, 701.

3. *De facto officer—collateral attack on authority of officer de facto.*

OFFICERS—Continued.

A public officer who wrongfully but in good faith holds over and continues to exercise the functions of an office after the term for which he was elected or appointed has elapsed, there being no de jure incumbent, is a de facto officer, and his title or authority cannot be collaterally questioned in proceedings to which he is not a party or which were not instituted to determine their validity. *Territory v. Mattoon*, 672.

4. *Judge de facto.*

Where a judge of a circuit court of this Territory was commissioned by the President with the advice and consent of the Senate of the United States for the term of four years commencing on the 6th day of January, 1909, continued, after the 6th day of January, 1913, to perform the duties of the office as he had theretofore been doing; no new appointment having been made and there being no other claimant of the office; and the department of justice has continued to recognize the incumbent as such judge; held, that he is at least a de facto judge. *Territory v. Mattoon*, 672.

5. *Letting public contracts.*

Under a statute providing for the letting of public contracts to the lowest responsible bidder, the refusal of the awarding officers to award a contract to the lowest bidder can be justified only when it has been made to appear upon a public hearing and investigation conducted with fairness, impartiality and thoroughness that he is not a responsible bidder. *Wilson v. Lord-Young Eng. Co.*, 87.

6. *Meaning of "responsible bidder."*

The phrase "responsible bidder" means one who is not only financially responsible, but who is possessed of the judgment, skill, ability, capacity and integrity requisite and necessary to perform the contract according to its terms. In determining the question of the responsibility of a bidder awarding officers have a wide discretion, but that discretion must be exercised fairly, honestly and judicially. *Wilson v. Lord-Young Engineering Co.*, 87.

7. *Uncertainty in specifications.*

The specifications for a public contract upon which bids are requested should include every element essential to furnish a common standard by which to measure the respective bids, and where they are so indefinite or misleading as to prevent real competition between the bidders, no valid contract can be based upon them. Where, in a call for tenders for the construction of a road, no time was fixed within which the work should be completed, but the bidders were required to state in their bids the time in which they would agree to complete the work, and neither the call for tenders nor the specifications stated the value

OFFICERS—Continued.

which would be placed upon the difference in time, and the awarding officers were not bound to consider the difference in time in which the bidders agreed to complete the work in determining who was the lowest bidder, held that the specifications were fatally defective and no contract could be awarded on them. *Wilson v. Lord-Young Engineering Co.*, 87.

See also ATTORNEY-GENERAL; CORPORATIONS, 3; PUBLIC OFFICERS; SHERIFFS AND CONSTABLES.

OFFICER'S RETURN.

See EXECUTIONS, 1.

OPINIONS.

See COURTS, 1.

ORDERS.

See JUDGES, 2.

ORDINANCE.

See MUNICIPAL CORPORATIONS, 3, 4, 5, 6.

OUSTING JURISDICTION.

See LANDLORD AND TENANT, 8.

PAROLE.

See EXTRADITION, 1, 2.

PAROL EVIDENCE.

See EVIDENCE, 14.

PARTICEPS CRIMINIS.

See CONTRACTS, 2.

PARTIES.

1. *Garnishee without interest in proceedings in error not a necessary party.*

Where a bank as garnishee appears in the court below and makes disclosure showing funds in its possession to the credit of the defendant in excess of the amount of the plaintiff's claim, as well as in excess of the judgment thereafter rendered, and there being no question or dispute as to the amount of the deposit in the bank to the credit of the defendant, and it appearing that the garnishee has no interest in the litigation or in the result thereof, such garnishee is not a necessary party to the proceedings in error brought by the plaintiff in error (defendant below). *Ting v. Born*, 638.

2. *Non-joinder of defendants—waiver.*

In the absence of statute the rule is that the non-joinder of a defendant in an action ex contractu can be taken advantage of,

PARTIES—Continued.

when the defect is not apparent on the fact of the declaration, only by plea in abatement and that when such a plea is not presented an answer of general denial and trial on the merits constitute a waiver of the defect. Section 1736 R. L. does not alter the rule. *Scott v. Kona Development Co.*, 408.

PARTITION.

1. *Disputed title—jurisdiction.*

In a suit for partition where the answer of the respondent, made under oath, is responsive to the bill and denies the cotenancy of the parties to the suit and the complainant's legal title to as well as his possession of the premises, and sets up legal title to the premises and exclusive possession thereof in the respondent, a court of equity will decline jurisdiction to try this question of disputed title; but will retain the bill for a reasonable time, until the issue of title has been determined in an action at law. *Brown v. Davis*, 327.

PARTITION SALE.

See JUDICIAL SALES.

PAYMENT.

1. *Burden of proof.*

Payment and counter-claim are affirmative defenses and the burden is upon the party pleading them to prove them by a preponderance of the evidence. *Bannister v. Lucas*, 222.

PEDIGREE.

See EVIDENCE, 15.

PHYSICIANS AND SURGEONS.

1. *The practice of medicine—proof of single act.*

A single act of the use of a drug for the treatment of disease in the human subject, performed by one upon another, may constitute the practice of medicine within the meaning of sections 1068 and 1069 of the Revised Laws, where there is other evidence in the case which colors and characterizes that act and tends to show that it was not a mere casual or friendly one, but one purporting to be of a professional character. *Territory v. Takamine*, 465.

See also EVIDENCE, 6.

PLEADING.

1. *Allegation and proof—variance.*

Where, in an action of assumpsit, it is alleged that the defendant is indebted to the plaintiff in the sum of \$600 as a portion of the purchase price of a certain automobile and the proof is,

PLEADING—Continued.

that the plaintiff being the owner of a Hupmobile of the value of \$700 and the defendant being the owner of an E. M. F. car of the value of \$1450, they agreed to and did exchange cars, and in consideration of the difference in value of the cars the plaintiff promised to pay the defendant the sum of \$750; that thereafter they agreed that the defendant take the E. M. F. car back and pay the plaintiff the sum of \$600 for the Hupmobile, which the defendant was to retain. Held, that the legal effect of the latter transaction was a sale of the Hupmobile by the plaintiff to the defendant; that the first contract was abrogated and rescinded by the second contract; and that there was no variance between allegation and proof. *Ting v. Born*, 652.

2. *Bill to cancel deed—inadequacy of consideration.*

A general averment in a bill to cancel and set aside a deed that the price paid was so grossly inadequate as to render the transaction fraudulent, in the absence of a statement of any facts, is an allegation of a mere conclusion of law. *de Souza v. Soares*, 330.

3. *Setting out or describing deed.*

In a bill in equity to cancel a deed it is sufficient to describe the deed so that it may be identified and to plead its legal effect. The deed need not be set out in full. *de Souza v. Soares*, 330.

4. *Charge—keeping liquor for sale.*

A charge that the defendant, at a time and place named, he not being a licensee, or the agent or employee of a licensee, did unlawfully keep for sale intoxicating liquor, is sufficient. *Territory v. Ah Cheong*, 10.

5. *Inconsistent defenses.*

The defense of eviction from certain designated portions of the demised land and that of an entire failure to obtain possession of the remainder are not inconsistent.

Pleas are often entertained which cannot be reconciled with each other. *Scott v. Pilipo*, 766.

6. *Replication in equity—curing failure to reply.*

If a complainant has omitted to file a replication within the time limited by rule, the court may grant leave to file it afterwards. When proof is necessary to a proper understanding of the case and a hearing upon bill and answer alone may work injustice to the complainant and the filing of a replication will cause no prejudice to respondent, leave to file one should be granted, at least when applied for without unreasonable delay and before the trial is commenced. *Bowen v. Nakuina*, 470.

See also ASSUMPSIT, 1; EXCEPTIONS; INDICTMENT AND INFORMATION, 2; MUNICIPAL CORPORATIONS, 6; NAMES; PARTIES, 2; PRINCIPAL AND AGENT, 8; RECORDS, 3.

POLICE POWER.

See CONSTITUTIONAL LAW, 2, 7; FISH, 1.

POSITIVE AND NEGATIVE TESTIMONY.

See TRIAL, 5.

POWER OF APPOINTMENT.

See MUTUAL BENEFIT INSURANCE, 4.

PRACTICE.

See APPEAL AND ERROR, 9; CORPORATIONS, 6; COURTS, 3; CRIMINAL LAW, 1; EQUITY, 7, 10; EVIDENCE, 1, 7, 8; INFANTS, 1, 2; INJUNCTIONS; JURY; LANDLORD AND TENANT 8; PAYMENT; TRIAL, 3, 5.

PREJUDICIAL ERROR.

See TRIAL, 8.

PREPONDERANCE OF EVIDENCE.

See DIVORCE, 7.

PRESUMPTIONS.

See EVIDENCE, 16.

PRESUMPTION AS TO SILENCE.

See PRINCIPAL AND AGENT, 6.

PRESUMPTION OF OWNERSHIP.

See CARRIERS.

PRIMA FACIE CASE.

See EJECTMENT; INJUNCTION.

PRINCIPAL AND AGENT.

1. *Agent to procure purchaser—procuring cause of sale.*

A broker employed to procure a purchaser for land who finds a prospective purchaser who is able and willing to buy and starts negotiations which result in the coming together of the owner and purchaser in the final relation of vendor and vendee will be regarded as the procuring cause of the sale. *Trent Trust Co. v. Macfarlane*, 435.

2. *Ability of purchaser to perform—deed taken in name of trustee.*

The ability of a purchaser to perform is not open to question where a sale has been effected upon the vendor's terms, and it does not affect the broker's right to a commission on the sale that the purchaser borrowed the money with which to pay the purchase price and the deed was taken in the name of a trustee. *Trent Trust Co. v. Macfarlane*, 435.

3. *Transaction closed through second broker—right to commission on sale.*

PRINCIPAL AND AGENT—Continued.

The broker who was the procuring cause of a sale will not be deprived of his right to a commission because the transaction was closed through a second broker where the principal had taken no steps to terminate the agency before the purchaser had been procured. *Trent Trust Co. v. Macfarlane*, 435.

4. *Implied authority—revenue stamps.*

An agent instructed to collect a sum named as the purchase price of certain leases, which the principal had agreed to transfer to the purchaser by a "good and sufficient deed of assignment," and to deliver the assignment, has implied authority to permit the purchaser to retain out of the agreed consideration the amount of the cost of the revenue stamps required by law to be affixed to the instrument. *Gehr v. Breckons*, 602.

5. *Ratification of unauthorized act of agent.*

A principal must disavow the unauthorized act of his agent within a reasonable time after the fact has come to his knowledge or he will be deemed to have ratified it. *Gehr v. Breckons*, 602.

6. *Burden of proof—presumption as to silence.*

The burden of proving a ratification of the unauthorized act of an agent is upon the party relying upon it. There is no presumption, either of law or of fact, that a principal was silent when it was his duty to speak or that circumstances existed upon which a claim of ratification may be based. *Gehr v. Breckons*, 602.

7. *Breach of duty—burden of proving damage.*

In an action on the case for breach of duty by an agent by paying, contrary to his instructions, claims presented against the principal, the burden is upon the plaintiff to prove the extent of his damage by showing that the claims were unfounded either in whole or in part or that facts existed which would have reasonably enabled plaintiff to make a favorable compromise of the claims. *Gehr v. Breckons*, 602.

8. *Written contract in name of agent—pleading.*

In a suit by a principal upon an agreement in writing which appears on its face to be the contract of the agent only, the contract should be declared on as made by the principal through the agent. *Young Chun v. Robinson*, 70.

See also ASSUMPSIT, 4, 6; CORPORATIONS, 1, 2; INTOXICATING LIQUORS; SALES.

PRISONER.

See EXTRADITION, 1, 2.

PRIVY COUNCIL.

See EMINENT DOMAIN.

PROCESS.**1. When issued—service of—returnable.**

Process is issued when prepared and placed in the hands of a person authorized to serve it with the intent to have it served. Process issued and served on the day it is made returnable is not in compliance with the statute. *R. L. Sec. 1705. Gear v. Henry*, 101.

See also **SHERIFFS AND CONSTABLES**, 1, 2.

PROHIBITION.**1. Contempt proceedings—void order.**

A writ of prohibition may be issued to prohibit a divorce court from enforcing by proceedings for contempt a void order for the payment of alimony. *Andrews v. Whitney*, 265.

2. General rule—exceptions.

The general rule is, that prohibition will not be granted until the question of jurisdiction has been raised without success in the lower court. To this general rule, however, which is one of practice rather than of jurisdiction, there are exceptions. *Union Feed Co. v. Kaathue*, 347.

3. Enforcement of execution prevented.

A writ of prohibition to prevent the enforcement of an execution on the ground of the invalidity of the judgment will be refused where there is an adequate remedy, either by motion in the lower court, or by appeal. *Union Feed Co. v. Kaathue*, 347.

PROMISE TO PAY.

See **ACCOUNT STATED**.

PROOF.

See **LANDLORD AND TENANT**, 8; **PHYSICIANS AND SURGEONS**.

PROPOSALS.

See **OFFICERS**.

PUBLIC CONTRACTS.

See **OFFICERS**, 1, 5, 7.

PUBLIC FISHERIES.

See **CONSTITUTIONAL LAW**, 7.

PUBLIC HEALTH.

See **HEALTH**.

PUBLIC LANDS.**1. Acquisition of private title.**

The title to land which was never awarded by the land commission nor granted by the government remains in the government. The Mahele of 1848 did not confer title on the chiefs to

PUBLIC LANDS—Continued.

the lands therein set apart to them. *In re Title of Pa Pelekane*, 175.

2. Acquisition of private title—award of land by name.

The award of an ahupuaa by name only would not pass title to a piece of land which, though originally a portion of the ahupuaa, had, prior to the award, been permanently detached from and taken out of the ahupuaa. *In re Title of Pa Pelekane*, 175.

3. Assignment of interest under freehold agreement.

An agreement between a freeholder and another whereby the former, for a valuable consideration, gives to the other the right to enter upon the land held under a freehold agreement and to grow and harvest crops of sugar cane thereon constitutes an assignment of a part of the freeholder's interest under the freehold agreement within the purview of section 326, R. L. *In re Henderson*, 104.

4. Freehold agreement—planting and care of trees.

Under section 326, R. L., trees growing naturally upon the land may be counted as in compliance with the requirement as to "the planting and care of not less than an average of ten timber, shade or fruit trees per acre;" the word "and" in the sentence quoted is to be construed as "or." *In re Henderson*, 104.

5. Freehold agreement—cultivation of land.

The cultivation of premises in compliance with the statute must be done by the freeholder or for him by his servants or agents. The crops grown must be the crops of the freeholder and not those of another. *In re Henderson*, 104.

6. Maintenance of home.

Under Chapter 22, R. L., a distinction exists between "residence" and "home." The occupying of a house on a certain piece of land, for the length of time required to obtain title, without making it a home within the proper meaning of the term, but for the purpose merely of making a showing to obtain a patent to the land, and with the intention of going to live elsewhere immediately upon the expiration of that time, does not constitute a compliance with the requirement of section 326 R. L., to maintain a home on the premises, for the intention and good faith inseparably involved in the idea of the maintenance of a home are not present. *In re Henderson*, 104.

PUBLIC OFFICERS.

See OFFICERS.

PUBLIC RECORDS.

See EVIDENCE, 3.

PURCHASER.

See FRAUDULENT CONVEYANCES, 3.

QUIETING TITLE.

See EQUITY, 7.

RATIFICATION.

See PRINCIPAL AND AGENT, 5, 6.

REASONABLE DOUBT.

See DIVORCE, 7.

RECORDS.

1. *Registration of title to land—nature of proceeding—unassigned dower.*

A proceeding to bring land under the statute providing for the registration of titles partakes of the nature of a suit in equity, and the court of land registration has power to decree in whom the title or any interest, legal or equitable in land is vested, whether in the applicant or in any other person. The court, in the exercise of its powers, will recognize the right and power of a widow over her unassigned dower, and will sustain her contracts in relation thereto, when fairly made, and will also protect the rights of the assignee of such dower. *In re Title of Palmyra Island*, 431.

2. *Registration of title to land, nature of proceeding.*

A proceeding to bring land under the statute providing for the registration of titles partakes of the nature of a suit in equity, and it is not correct practice in such a proceeding to dismiss the application at the close of the petitioner's case on the motion of respondent unless the respondent also rests. *In re Title of Pa Pelekane*, 175.

3. *Failure of proof—amendment of pleadings.*

Where, in such a proceeding, the application sets forth a claim of title in fee simple absolute and alleges a source of title which is legally invalid, but no objection was raised to the form of the pleading, any evidence tending to prove the general claim of title in fee simple is admissible, and the matter of amending the application may remain in abeyance until the close of the evidence. *In re Title of Pa Pelekane*, 175.

See also APPEAL AND ERROR, 6.

REGISTRATION OF TITLE.

See RECORDS, 1, 2.

REHEARING.

See APPEAL AND ERROR, 5.

REMAINDERS.

1. *Destruction of contingent, through merger of estates.*

The common law doctrine as to the defeating of contingent remainders through the merger of estates has never been recognized in Hawaii. *Evans v. Bishop Trust Co.*, 74.

REMAINDERMEN.

See TRUSTS, 3.

REPLICATION.

See PLEADING, 6.

RES GESTAE.

See EVIDENCE, 18.

RES JUDICATA.

See JUDGMENTS, 3.

RESPONSIBLE BIDDERS.

See OFFICERS, 6.

REVIEW OF FACTS.

See DIVORCE, 10.

REVOCABILITY.

See TRUSTS, 2.

REVOCATION.

See LICENSES.

ROADS AND STREETS.

See STREET RAILROADS.

SALES.

1. *Delivery to carrier—general rule—title passes.*

The general rule is, that where goods are delivered by the vendor in pursuance of an order to a common carrier for delivery to the purchaser, the delivery to the carrier passes the title, as the carrier is the agent of the purchaser to receive the goods, and the delivery to the carrier is equivalent to a delivery to the purchaser. *Territory v. Reis*, 772

See also PRINCIPAL AND AGENT, 1, 2, 3; INTOXICATING LIQUORS.

SCINTILLA.

See EVIDENCE, 12, 13.

SEAMEN.

See GARNISHMENT.

SEPARATE ASSESSMENTS.

See TAXATION, 4.

SERVICE.

See PROCESS.

SET-OFF AND COUNTER-CLAIM.

1. *Judgment.*

D having obtained a judgment against S, husband of the plaintiff in this action, assigned the judgment to K, one of the defend-

SET-OFF AND COUNTER-CLAIM—Continued.

ants. The defendants sought to set up this judgment as a partial defense against the plaintiff's claim against them. Held, that the plaintiff's claim, a promissory note delivered to her by the defendants for a valuable consideration moving from her, was her individual property and free from any claim which the defendants may have against her husband. *Scott v. Kona Development Co.*, 258.

SHERIFFS AND CONSTABLES.**1. Civil liability—protection afforded by process.**

The law protects an officer in the execution of process if it is in due form and issued by a court which apparently has jurisdiction of the case, although it may have in fact been issued wrongfully or without authority. *Gomez v. Whitney*, 539.

2. Service of order compelling attendance of witnesses.

A sheriff to whom a judicial order requiring a certain person to enter into a recognizance to appear as a witness and commanding that in default thereof the proposed witness be committed to jail is delivered for service and who, proceeding immediately to the performance of his duty, finds the proposed witness, with the admitted intention of departing from the jurisdiction, on board of an ocean-going steamship about to cast loose from the dock, does not render himself civilly liable by failing to inform the person named, before taking him ashore, that he may enter into a recognizance, where it further appears that the proposed witness was unable to give bail, that there was no opportunity before the steamship sailed to arrange for and enter into a satisfactory recognizance and that after the arrest the proposed witness remained in custody four days without offering to furnish a recognizance. *Gomez v. Whitney*, 539.

SHERIFF.

See **COSTS**, 6.

SHERIFF'S SALE.

See **EXECUTIONS**, 3.

SIGNATURES.**1. Use of mark.**

The making of a cross-mark on a written instrument by an illiterate person is a sufficient signing of the instrument, the mark being intended as a signature. *Gomes v. Lusitana Society*, 683.

SPECIFICATIONS.

See **OFFICERS**, 7.

SPONTANEOUS DECLARATIONS.

See **EVIDENCE**, 18.

STARE DECISIS.

1. *Decisions of courts of last resort binding on inferior tribunals.*

The decisions of a court of last resort are binding upon all tribunals inferior to it. Held, accordingly, that a decision made by the supreme court of the United States following the opinion of the supreme court of Hawaii upon a matter of local law is binding upon this court in another case notwithstanding the belief of this court that its former opinion was wrong. *Kapiolani Estate v. Atcherley*, 441.

See also COURTS, 2, 3.

STATUTES.

1. *Consideration of—letter—intent.*

In the absence of an obviously mistaken or inaccurate use of words the letter of a statute will not be extended by construction to meet the alleged intent of the legislature where no injustice, absurdity, repugnance or inconvenience will result from a literal interpretation. *In re Inter-Island Steam Navigation Co.*, 6.

2. *Act 143, Laws of 1911, construed.*

The statute making an appropriation for the purpose of repaying moneys wrongfully collected as merchandise license fees under sections 764 to 768 of the Penal Laws, 1897, did not include license fees paid prior to June 14, 1900, in advance for a period extending beyond that date. *In re Inter-Island Steam Navigation Co.*, 6.

3. *Prospective and retrospective—construction.*

The rule that a statute is to be construed as having only a prospective and not a retrospective operation has no application to a statute where the legislature in plain and unambiguous terms has expressly made it retrospective. With such a statute there is no room for construction. *Apokaa Sugar Co. v. Wilder*, 571.

STATUTE OF FRAUDS.

See EASEMENTS.

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTIONS.

STATUTORY POWER.

See Health, 2.

STENOGRAPHER'S NOTES.

See TRIAL, 1.

STIPULATIONS.

See COSTS, 10.

STREET RAILROADS.

1. *Obligation to pave street.*

The duty imposed on the street railway company by section 838, R. L., to pave or macadamize the portions of the streets occupied by its tracks whenever the other portions of the streets are paved or macadamized is not limited to original construction, but requires the company to lay a pavement corresponding with a new pavement laid down by the proper governmental authority though the portion of the street occupied by the company had previously been macadamized. *Honolulu R. T. & L. Co. v. Territory*, 136.

2. *Obligation to conform to street improvements.*

Under Section 864, R. L., the duty is imposed on the street railway company to pave its portion of the street so as to conform to a new pavement laid down on the rest of the street, by the city and county of Honolulu, whether the duty is enjoined by Section 838, R. L., or not. The word "Territory" as used in Section 864, is equivalent to "Government" and includes street improvements made by the municipality. *Honolulu R. T. & L. Co. v. Territory*, 136.

3. *Discretion of superintendent of public works as to directing kind of pavement.*

The obligation of the street railway company as to paving is defined and fixed by the franchise act. The superintendent of public works has no discretion to authorize the laying of a pavement of a kind different from that used by the government. *Honolulu R. T. & L. Co. v. Territory*, 136.

4. *Necessity for repaving streets—how determined.*

The necessity for repaving the streets is to be determined by the governmental authorities having charge of such work. And in prescribing the kind of pavement to be used the authorities are not limited to that which was in ordinary use at the time of the granting of the franchise. *Honolulu R. T. & L. Co. v. Territory*, 136.

5. *Reasonableness of requirement to repave street.*

Notice to the railway company that it shall conform to a patented bitulithic pavement laid upon a concrete foundation put down on a certain section of King street, in Honolulu, by the municipal authorities does not constitute an unreasonable requirement, it not appearing that the cost would be excessive or that the owner of the patent contemplated exacting conditions other than payment of the price of the material and the cost of laying the pavement, and no claim being made that the pavement was not an approved one, or that the action of the municipality in laying it was in any way improper or inappropriate, though nearly one-half of the life of the franchise has expired, and at

STREET RAILROADS—Continued.

the end of the term of the franchise the ties could be taken up only with much difficulty. *Honolulu R. T. & L. Co. v. Territory*, 136.

STREETS.

See **ROADS AND STREETS.**

STREET IMPROVEMENTS.

See **STREET RAILROADS**, 2.

SUBMISSION OF CONTROVERSY.

1. *Judgment.*

Where, in a submission on agreed facts without action, the case presented is such that an enforceable judgment cannot be entered, the proceedings should be dismissed. *Honolulu R. T. & Land Co. v. Territory*, 171.

SUBSTANTIAL PERFORMANCE.

See **CONTRACTS**, 7.

SUFFICIENCY OF EVIDENCE.

See **EVIDENCE**, 15.

SUMMARY POSSESSION.

See **LANDLORD AND TENANT**, 7, 8.

SUPERINTENDENT OF PUBLIC WORKS.

See **STREET RAILROADS**, 3.

SURPLUSAGE.

See **INDICTMENT AND INFORMATION**, 2.

TAXATION.

1. *Assessments—Hawaiian land hui.*

An assessment of taxes to the "Hui of Kahana" is not authorized by statute. In cases of Hawaiian land hui the assessments should be to the individual members upon the respective undivided interests as tenants in common in the lands of the hui. *In re Taxes, Hui of Kahana*, 676.

2. *Taxation—authority of assessor—action on judgment.*

Under Section 1193 of the Revised Laws a tax assessor has authority to maintain an action upon a judgment obtained by his predecessor in office against a delinquent taxpayer. *Wilder v. Colburn*, 701.

3. *Exemption—water system.*

Property used in the construction of a water system created in the main for the purpose of supplying water to a cane-planting corporation and only incidentally for the purpose of selling water to the general public is not under Act 136 of the Laws of

TAXATION—Continued.

1907 exempt from taxation. *In re Taxes, Waiahole Water Co., Ltd.*, 679.

4. *Water rights—separate assessment.*

When by virtue of a conveyance water rights have been severed in ownership from the lands to which they were originally appurtenant, the water rights may be assessed separately for purposes of taxation. *In re Taxes, Waiahole Water Co.*, 679.

5. *Valuation—full cash value.*

The fact that two days before the assessment date a taxpayer purchased property for the agreed price of \$257,500 supports a finding that on the assessment date the full cash value of the property was \$250,000. *In re Taxes, Waiahole Water Co., Ltd.*, 679.

6. *Life insurance companies—tax on amount of business done.*

Section 2621 of the Revised Laws, as amended by Act 65 of the Laws of 1911, which imposes upon all life insurance companies doing business in the Territory a tax upon "the gross premiums received from all business done within the Territory during the year ending on the preceding 31st day of December," less certain deductions, requires that in estimating the amount of the tax there shall be included the renewal premiums received during the year upon policies issued prior to the year in question. *New York Life Insurance Co. v. Hapai*, 424.

7. *Rate on income derived during the year 1912.*

The rate of the so-called conservation tax on income derived during the year 1912 was reduced from two per cent to one per cent by Act 164, Laws of 1913, the act being expressly made retrospective in its operation whereby the year 1912 was, in effect, designated as the first taxation period thereunder. *Apo-kaa Sugar Co. v. Wilder*, 571.

8. *Valuations.*

Upon the evidence a decision of a tax appeal court is reversed and lower valuations placed upon the property involved. *In re Taxes, Kapiolani Estate*, 667.

9. *Valuation of enterprise for profit—past history and future prospects and possibilities.*

When a sugar-producing plantation has recently undergone extensive development through the acquisition or use of additional lands or water supply, it would be unsafe in determining the value of the aggregate property of the corporation for taxation purposes to place entire reliance upon the profits and dividends received from the three crops harvested since the extension, largely from virgin soil and at a time when prices of sugar were unusually high. Reasonable allowance must be made, as an intending investor would make, for a possible decrease of profits and dividends for the future due to possible reduction in the

TAXATION—Continued.

yield of cane and in the prices of sugar and increase in the cost of production.

In valuing the property of such a corporation as an enterprise as a whole intending purchasers consider chiefly the earning power of the property in the long run as shown by its past history and future prospects and possibilities. The main consideration is the future, the past being of importance chiefly in determining what the future is likely to be. The conservative, not the speculative, spirit should control in matters of assessments. *In re Assessment of Taxes*, 352.

10. *No one rule applicable in all cases.*

In making such valuations no one rule can be justly followed in all cases, so varying are the factors that go to determine the values in different cases. The statute requires that in each case there shall be "taken into consideration" besides certain matters specially enumerated, "all other facts and considerations which reasonably and fairly bear upon such valuation." *In re Assessment of Taxes*, 352.

11. *Valuation of Wailuku Sugar Company's plantation.*

Upon the evidence a valuation of \$3,600,000 is placed on the property of the Wailuku Sugar Company's sugar plantation for taxation purposes for the year 1912. *In re Assessment of Taxes*, 352.

12. *Valuation of Paauhau Sugar Company's plantation.*

A valuation of \$1,500,000 for the year 1912 placed on the sugar plantation of the Paauhau Sugar Plantation Company by the tax appeal court is sustained and the appeal of the Territory is dismissed. *In re Assessment of Taxes*, 352.

13. *Weight of decision of tax appeal court.*

In the supreme court a tax appeal occupies about the same position as an equity appeal. The presumption is that the decision appealed from is correct and the burden is upon the appellant to show wherein it is erroneous. Where most of the evidence is documentary, and comparatively little depends upon the credibility of witnesses the presumption may be more readily overcome than it would be in a case turning largely on the weight of testimony. *Hawi Mill Co. v. Forrest*, 389.

14. *Valuation reduced when too high.*

The assessment of the property of Hawi Mill & Plantation Co., Ltd., as of January 1, 1912, by the tax appeal court at \$1,200,000 held, upon the evidence, too high, and reduced to \$1,100,000. *Hawi Mill Co. v. Forrest*, 389.

See also CONSTITUTIONAL LAW; LANDLORD AND TENANT, 9; LIMITATION OF ACTIONS, 2; TRUSTS, 3.

TAX APPEALS.

See TAXATION.

TAX APPEAL COURTS.

See TAXATION.

TENANCY IN COMMON.

1. *Services of co-tenant—right to compensation.*

Tenants in common are not entitled to charge for services rendered in the sale of the common property, unless there has been a special agreement or a mutual understanding to that effect. The mutual understanding of the parties may be proved by the facts and circumstances of the case, and, though it may not be shown that any specific amount had been agreed upon as compensation, yet, if it clearly appears to the satisfaction of the court that compensation for the services to be rendered was to be made, the law will imply an obligation to pay a reasonable amount. *Wall v. Focke*, 399.

2. *Implied agreement for compensation—evidence.*

The mere fact that a co-tenant is, with the knowledge of the other owners, making efforts to sell the common land and that the sale, if accomplished, will result to the benefit of all the other co-tenants is not sufficient to justify the inference that the more active co-tenant is making the efforts with the expectation of compensation from the others or the inference that the others knew or must have known that he had such expectation. *Wall v. Focke*, 399.

3. *Obligation to compensate not implied by law.*

From the mere fact that a defendant had knowledge of his co-tenant's efforts to procure a purchaser of the common land, that he acquiesced in those efforts, which proved successful, and that he was benefited by the sale, the law will not, without reference to the intention of the parties, imply an obligation on the defendant's part to pay his co-tenant for the services so rendered. *Wall v. Focke*, 399.

See also CO-TENANCY.

TENDERS.

See MORTGAGES; OFFICERS, 1.

TITLE.

See QUIETING TITLE; MUNICIPAL CORPORATIONS, 3; PUBLIC LANDS, 1, 2; RECORDS, 1; SALES.

TRANSCRIPT.

See APPEAL AND ERROR, 7; COSTS, 7, 8, 10; TRIAL, 1.

TRANSLATION.

See EVIDENCE, 19.

TREES.

See NEGLIGENCE; PUBLIC LANDS, 4.

TRIAL.

1. *Charge of court to jury—stenographer's notes—transcript.*

Where an official stenographer is present and taking notes of the charge of the court to the jury, it is not necessary for the court to reduce its charge to writing, but such charge may be given orally, and noted by the stenographer. Failure of the stenographer to transcribe such charge and file the same within the statutory time will not, in the absence of prejudice, entitle a party, as a matter of right, to a new trial. *Chung Nung v. Territory*, 395.

2. *Findings of fact—credibility of witness.*

Issues concerning the credibility of witnesses and the weight of the evidence are to be determined by the trial court and the findings cannot be disturbed if supported by evidence. *Lau Lam v. Whitcomb*, 253.

3. *Instructions.*

Instructions need not be given in the language requested if those which are given correctly state the law and fairly and sufficiently cover the ground. But where instructions are asked which correctly state the law on any issue presented it is error to refuse to give them unless the points are adequately covered by the instructions given. It is generally considered error to refuse to give a requested instruction on a given point which is accurate and applicable though the point may have been inferentially covered by a general instruction which was given. *Nawelo v. Von Hamm-Young Co.*, 644.

4. *Instructions to jury—comment on evidence.*

An instruction given by a trial judge to a jury from which it may reasonably be inferred that the judge regards certain material evidence as unworthy of credence or of less weight than other opposing evidence is a comment on the character, strength and credibility of the evidence, and the giving of such an instruction is a violation of Section 1798 of the Revised Laws. The error is not cured by an instruction that the judge had "no right to comment upon the testimony nor to make any findings of fact." *Bannister v. Lucas* 222.

5. *Instructions—positive and negative testimony.*

An instruction that "all other things being equal, the witnesses of equal credibility, testimony of a positive character is more to be relied upon than testimony of a negative character" is correctly refused where it is unaccompanied by a specific statement of the circumstances under which the rule may be applied and is inapplicable to hearsay testimony admitted upon a question of pedigree. *Uuku v. Kaio*, 710.

TRIAL—Continued.

6. *Nonsuit—time for motion.*

A motion for a nonsuit may be granted even though made at the close of all of the evidence in the case, provided only that the defendant's evidence does not cure the defect complained of in the plaintiff's proof. *Scott v. Kona Development Co.*, 408.

7. *Remarks of the court in presence of the jury.*

Counsel having moved that the witnesses be excluded from the court room, the court remarked, "I see no witnesses here except one, and he is a banker." Held, that the natural and reasonable construction to be placed upon the remark of the court is, that the court thereby intended to convey the idea that there was but one witness in the court room, and that the standing or credibility of the witness was not thereby alluded to or implied. *Ting v. Born*, 652.

8. *Remarks of court evoked by motion for nonsuit.*

Counsel having moved for a nonsuit, the court and counsel thereupon, in the presence of the jury, entered into a discussion as to the legal effect of the plaintiff's complaint. The court thereafter instructed the jury to disregard the remarks of the court so made. Held, under the circumstances of this case, that the remarks were not prejudicial error. *Ting v. Born*, 652.

TRIAL BY JURY.

See CONSTITUTIONAL LAW, 5, 7.

TRUSTS.

1. *Construction of trust in favor of heirs and legal representatives.*

Where in contemplation of remarriage, property was conveyed by A. G., a widow, to a trustee to hold and manage the estate, pay the net income to the grantor until her son J. shall attain the age of twenty-one years, if the grantor shall live so long, and upon J. attaining the age of twenty-one, to convey, transfer and deliver to J. one-half of the property, and to hold the other one-half thereof in trust for the grantor absolutely; that in the event of the death of J. before the death of A. G. and before attaining the age of twenty-one, to hold all said property in trust for A. G. absolutely; and 'in the event of the death of the grantor before said J. shall have attained the age of twenty-one, the trustee, upon the death of the grantor to convey, transfer and deliver one-half of the property to the heirs and legal representatives of the grantor and to hold the remaining one-half in trust for said J. absolutely, the apparent intention of the grantor being to preserve the corpus of the estate for the benefit of her son J. and such other children as may be born to her, in case she should die before J. attains the age of twenty-one, the words

TRUSTS—Continued.

"heirs and legal representatives" are to be construed as words of purchase and description. *Evans v. Bishop Trust Co.*, 74.

2. *Revocability of—absence of clause of revocation.*

A trust of this character cannot be revoked by the settlor as against remaindermen in the absence of mistake or fraud. The omission of a clause of revocation without other circumstances than the mere mistaken belief on the part of the settlor that she possessed the power of revocation does not give rise to any inference which could be taken as a ground for the revocation of the trust. *Evans v. Bishop Trust Co.*, 74.

3. *Disposition of income—apportionment of taxes.*

Under a trust, created by deed, "out of the net income * * * after payment of all taxes * * * to pay" to the grantor "the entire net income * * * for life," the taxes on the trust property for the year 1913 are not apportionable between the estate of the grantor, who died on March 21, 1913, and the remaindermen but are payable wholly out of the income that would otherwise go to the grantor. *Cummins v. Cummins*, 742.

See also WILLS, 4. 5.

TRUSTEES.

See PRINCIPAL AND AGENT, 2.

UNDUE INFLUENCE.

See DEEDS, 1.

USURY.

1. *Transaction not usurious.*

There being no evidence of any benefit or advantage exacted by the lender from the borrower in addition to the agreed rate of interest of twelve per cent per annum, the transaction is not usurious. *Pang Chew v. Kealakai*, 386.

VALUATION.

See TAXATION, 5, 7.

VARIANCE.

See EVIDENCE, 7; NAMES; PLEADING, 1.

VERDICT.

See EVIDENCE, 15.

VESTED INTERESTS.

See WILLS, 4.

VOID JUDGMENTS.

See APPEAL AND ERROR, 1.

VOID ORDER.

See CONTEMPT, 1; PROHIBITION, 1.

WAIVER.

See CORPORATIONS, 4; MUNICIPAL CORPORATIONS, 2;
MUTUAL BENEFIT INSURANCE, 2, 5; PARTIES, 2.

WAREHOUSE RECEIPTS.

See ESTOPPEL, 1.

WATER RIGHTS.

See TAXATION, 4.

WATER SYSTEM.

See TAXATION, 3.

WAYS.

See EASEMENTS.

WEIGHT OF EVIDENCE.

See NEW TRIAL, 1.

WILLS.

1. *Construction of—irreconcilable clauses.*

Where in a will two clauses are found to be in irreconcilable conflict the later will generally prevail over the earlier unless thereby the manifest intent of the testator gathered from the will as a whole would be defeated. *Hapai v. Brown*, 499.

2. *Devise of income, rents and profits of land.*

A gift of the income or the rents, issues and profits of property is to be construed as a gift of the property itself unless from some language in the will it appears that the testator intended something different. *Hapai v. Brown*, 499.

3. *Devise of real property construed according to lex rei sitae.*

The construction and effect of a devise of real property situated in a jurisdiction other than that of the testator's domicile is to be determined in accordance with the law of the jurisdiction where the land is situated. *Spreckels v. Spreckels*, 556.

4. *Devise of property in trust to divide and convey—vested interests.*

A testator devised and bequeathed all his estate to trustees in trust to pay the net income thereof to his wife during her natural life; and upon her death (or upon the death of the testator in case he should survive his wife) to divide the estate into three equal parts when one of such parts should be forthwith assigned, transferred, set over and delivered by them to his son C., same to be and become his absolutely forever, and another of such parts similarly to his son R.; and to pay the net income from the remaining equal third part of the estate to his daughter E. during her natural life, and upon her death to pay over the principal to E.'s children and grandchildren. The wife survived the testator and the sons and daughter survived

WILLS—Continued.

their mother. Held, that the trustees took the legal title to the entire estate in trust for the purposes stated in the will, and, that the will imposed upon the trustees the active duty, upon the death of the widow, to divide the estate into three equal parts and to assign, transfer and convey one of such parts to each of the two sons; that the testator did not intend that the equitable interests of the sons were to remain contingent until the division and transfer of the property by the trustees but that those interests were to become vested at least upon the death of the widow; that the fact that the estate was a large one which it might take a long time to divide would not prevent those interests from vesting in the sons in undivided shares subject to the division and transfer by the trustees; and that the will did not violate the rule against perpetuities. *Spreckels v. Spreckels*, 556.

5. *Effect of different constructions—trust void in domiciliary jurisdiction.*

Where a trust to convey real estate created by will is valid according to the law of Hawaii and is operative as to real estate situated in Hawaii, it will not be held ineffective or void so as to cause the property to pass as intestate estate upon the ground that such a trust is not permitted by the law of California, in which State the testator resided and wherein the bulk of his property was situated, and the will has been construed by the supreme court of that State as having given the beneficiaries legal estates by direct devises. In Hawaii such a trust will operate according to the intention of the testator notwithstanding the construction placed upon the will by the California court. *Spreckels v. Spreckels*, 556.

6. *Indefinite devise.*

An indefinite devise of land may be either for life or in fee according to the intention of the testator as gathered from the whole will. *King v. Hawaiian Trust Co., Ltd.*, 619.

7. *Gift of income, rents and profits of land.*

It is a general rule that a gift of the income or the rents, issues and profits of land is to be construed prima facie as a gift of the property itself; but this, like all other rules of construction, yields to the intent of the testator. *King v. Hawaiian Trust Co., Ltd.*, 619.

8. *Will construed.*

A testator devised and bequeathed his estate to a trustee in trust to control and manage the same and to pay the net income, rents and profits to T. J. C. during the term of his natural life, and after his death to "pay and deliver over the said net income, rents and profits to his daughters Lydia, Beatrice and Elizabeth, in equal parts if living, and if either of said daughters shall

WILLS—Continued.

then be dead, the principal and property, the interest and income of which would otherwise be going to her, shall be paid directly to her lineal heirs, if any, and if none, the said interest and income shall be paid to the survivors equally, and upon the death thereafter of either of the survivors, my said trustee shall pay and deliver over the principal and property, the interest and income of which has theretofore been paid to her, to her lineal heirs if any, and if none such then exist, shall then pay and deliver the same to the collateral heirs of such one dead." Held, that the word "either" was used in the sense of "any"; that the word "thereafter" referred to the death of T. J. C. and meant the period following that event; the word "survivors" meant daughters surviving their father; and that the three daughters who survived their father were entitled to the income during their respective lifetimes only. *King v. Hawaiian Trust Co., Ltd.*, 619.

See also EQUITY, 9; EXECUTORS AND ADMINISTRATORS, 1; MUTUAL BENEFIT INSURANCE, 5.

WITNESSES.

See COSTS, 4; FALSE IMPRISONMENT; JUDGES, 2; TRIAL, 2.

WITNESS FEES.

See COSTS, 4.

WRITS.

See ATTACHMENT.

WRIT OF ERROR.

See APPEAL AND ERROR, 8, 9.

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